Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1846

ARIZONA POWER AUTHORITY, ELECTRICAL DISTRICT No. 3, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT No. 4, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT No. 5, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT No. 6, PINAL COUNTY, ARIZONA; WELLTON-MOHAWK IRRIGATION and DRAINAGE DISTRICT; ROOSEVELT IRRIGATION DISTRICT; CITY OF SAFFORD; and ELECTRICAL DISTRICT No. 2, PINAL COUNTY, ARIZONA

Petitioners,

v.

ROGERS C. B. MORTON, *et al,.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 24, 1977

TABLE OF CONTENTS

STATUTES

MISCELLANEOUS

CASES CITED

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Arizona Power Authority, Electrical District No. 3, Pinal County, Arizona; Electrical District No. 4, Pinal County, Arizona; Electrical District No. 5, Pinal County, Arizona; Electrical District No. 6, Pinal County, Arizona; Wellton-Mohawk Irrigation and Drainage District; Roosevelt Irrigation District; City of Safford; and Electrical District No. 2, Pinal County, Arizona,[1] hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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[1] Hereinafter collectively referred to as "petitioners."

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 1a-39a) is reported at 549 F.2d 1231. The opinion of the district court (App. C, pp. 41a-54a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 17, 1977 (App. A, p. 39a). Petitioners' timely application for rehearing was denied on March 28, 1977 (App. B, p. 40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Colorado River Storage Project Act, 70 Stat. 105, 43 U.S.C. 620, *et seq.*, provides in pertinent part:

> "Section 4. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) * * *.
>
> * * *
>
> "Section 7. The hydroelectric powerplants and transmission lines authorized by this Act to be constructed, operated, and maintained by the Secretary shall be operated in conjunction with other Federal powerplants, present and potential, so as to produce the greatest practicable amount of power and energy that can be sold at firm power and additional energy rates * * *."

2. The Federal Reclamation Laws, Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto, provide in pertinent part (43 U.S.C. 485h(c)):

> "* * * Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further,* That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. * * * "

QUESTION PRESENTED

Whether, under the Colorado River Storage Project Act and the Federal Reclamation Laws, as amended, the Secretary of the Interior has the unreviewable discretion, in marketing electric power and energy generated at federal facilities, to establish a geographic preference favoring preference customers in certain states within the economic marketing area to the detriment of preference customers in other states in that marketing area.[2]

STATEMENT

Petitioner, Arizona Power Authority, is an agency of the State of Arizona, charged with the responsibility, among others, of purchasing electric power at wholesale for resale, *inter alia,* to municipalities, electric cooperatives, electrical districts and irrigation districts within the State of Arizona. All of the other petitioners are public bodies entitled to preference under the Federal Reclamation Laws in the purchase of power sold by the Secretary of the Interior and all of them are located within the Southern Division as defined in the General Power Marketing Criteria summarized below.

[2] Should certiorari be granted, petitioners reserve the right further to argue that the Secretary had exceeded his authority in undertaking to establish such a geographic preference with respect to the power and energy generated at the CRSP project.

On December 27, 1971, petitioners[3] filed a complaint against the Secretary of the Interior and the Commissioner of Reclamation, seeking a declaratory judgment and injunctive relief with reference to the General Power Marketing Criteria issued by the Secretary under the date of March 9, 1962 for the marketing of power generated at hydroelectric plants constructed and operated by the Bureau of Reclamation under the Colorado River Storage Project Act (CRSP), 70 Stat. 105, 43 U.S.C. 620, *et seq.*[4]

Basically, the CRSP Act authorized several projects for flood control and reclamation, irrigation and various other water resource developments, a number of which have already been constructed. As an incident to such water resource developments, the CRSP Act also authorized the Secretary to construct and operate certain facilities for the generation of hydroelectric power. Four such hydroelectric facilities have already been constructed having a combined firm electric power generating capacity of about 1,260,000 kilowatts, with Glen Canyon which is located in the Colorado River in Arizona below the Arizona-Utah border, having a capacity of 900,000 kilowatts.[5]

The Marketing Criteria divided the areas in which CRSP power was to be marketed into (1) a Northern Division

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[3]The complaint of Petitioner Electrical District No. 2, Pinal County, Arizona was filed on May 4, 1973 and tracks that of the other petitioners. See R. 268, *et seq.*

[4]The non-government respondent is the Northern Division Power Association, Inc., a Utah non-profit corporation comprised of 58 rural electric cooperatives, municipalities and public corporations or agencies, located in the Northern Division as defined in the General Power Marketing Criteria, all of which are purchasing CRSP power as preference customers under the Federal Reclamation Laws.

[5]Some idea of the magnitude of the CRSP project is available from the project reports prepared each year by the Bureau of Reclamation. Appendix D (p. 52a)' is a reproduction of page 11 of the 20th Annual Report for the project for the fiscal year 1976, setting out a map of the marketing area, together with the location of the several CRSP plants, transmission lines and delivery points. In addition, it shows that during fiscal 1976 the Secretary's revenues from the CRSP project aggregated nearly $58 million from the sale of 7.3 billion kilowatt hours.

consisting of all of the states of Colorado, New Mexico, Utah and Wyoming and (2) a Southern Division consisting of all of the state of Arizona and those portions of the states of California and Nevada which generally may be reached by the Federal Parker-Davis transmission grid.[6] Further, the Marketing Criteria provided for a permanent allocation to Northern Division preference customers of 80% of the summer CRSP power and 93% of the winter CRSP power and a permanent allocation of the remaining 20% of summer CRSP power and 7% of the winter CRSP power to the Southern Division preference customers.

Since the power which the Marketing Criteria would thus allocate permanently to the Northern Division preference customers was in excess of their then requirements, the Marketing Criteria went on to provide that such excess power would be made available to Southern Division preference customers temporarily and subject to withdrawal, on three years' notice, as needed to meet increases in the requirements of the Northern Division preference customers.

While the Secretary declined to make an allotment of CRSP power to the Arizona Power Authority because the Authority had expressly declined to accept the geographic preference prescribed in the Marketing Criteria for the Northern Division, the Secretary did enter contracts for CRSP power with the other petitioners over the period from 1965 to 1970, making "permanent" allocations to these petitioners. In addition, after these petitioners signed their contracts, the Secretary had available and sold to them on a "withdrawable" basis, in accordance with the Marketing Criteria and the provisions of their contracts required by the Secretary, all the power they could use in addition to their "permanent" allotments.

In addition to the foregoing, the complaint alleged that by letter dated December 11, 1970, the Secretary advised petitioners and the other Southern Division preference

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[6]For the purposes of this petition, the terms Upper Basin and Lower Basin are used interchangeably with Northern and Southern Division, respectively.

customers of his intent no later than March, 1973, to give notice that the "excess" CRSP power would be withdrawn beginning with the 1976 summer season. After the Secretary rejected their protests, petitioners filed on December 27, 1971 their complaint claiming that the establishment of a geographic preference in favor of the Northern Division preference customers both in the Marketing Criteria and in their contracts with the Secretary was arbitrary, an abuse of discretion and beyond the Secretary's authority under the CRSP Act.

Following the filing of the Secretary's answer, in which he admitted many of the basic facts alleged in the complaint, the Secretary filed a motion for summary judgment urging, *inter alia*, that the complaint failed to state a cause of action and that the action was an unconsented suit against the Government. By opinion and order issued March 10, 1975, as amended on May 2, 1975 (App. C, pp. 41a-54a), the District Court granted the Government's motion for summary judgment on the grounds that the Secretary's action was within the scope of his authority, and was not arbitrary, capricious or an abuse of his discretion.

In its opinion issued January 17, 1977, the Court of Appeals purported to review the pertinent statutory provisions and their extensive legislative history (App. A, p. 36a). Based on its reading of these materials, the Court concluded that, as urged by the Government for the first time on appeal, the establishment of a geographic preference in favor of the Northern Division preference customers does not violate any legal standard prescribed by the Congress, either in the CRSP Act or the Reclamation Laws generally, but rather was left to the Secretary's unreviewable discretion (App. A, pp. 36a). Accordingly, ruling that the instant proceeding was one of "these rare instances where 'statutes are drawn in such broad terms that * * * there is no law to apply.' *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402,, 410 (1970)." (App. A, pp. 14a-15a, 36a-37a), the court vacated the District Court's judgment and remanded the case to that Court for consideration of a motion to dismiss (App. A, p. 39a).

REASONS FOR GRANTING THE WRIT

The holding of the Ninth Circuit that the Secretary of Interior has unreviewable discretion to establish a geographic preference for power in favor of Northern Division preference customers to the detriment of the Southern Division preference customers flaunts "Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 97 S.Ct. 980, 983 (February 23, 1977). In addition, it grossly distorts the unusually clear legislative history of the CRSP Act by rejecting as "too vague" Congress' explicit directives requiring all preference customers within the CRSP marketing area to be treated on the same basis, with equal treatment and without discrimination in any respect based on geographic location.

As a result, if not reversed, the decision below may have important and far-reaching consequences. CRSP power constitutes a substantive and extremely valuable block of power in the CRSP marketing area. Even the Secretary's opposition to the stay requested by petitioners in the court below recognized that withdrawal of the relatively small quantity of power there involved (*i.e.*, 41,000 kilowatts) would subject petitioners to increased costs in excess of $1,000,000 over a single six-month period. In contrast, CRSP has a present generating capability in excess of 1,260,000 kilowatts with additional generating facilities still to be constructed, and a probable remaining service life in the order of at least 40 to 50 years.

In light of the energy shortage (particularly low cost energy) now confronting the several states in the CRSP marketing area[7] (along with the rest of the Nation), and the importance of low cost energy to the development of the still evolving economies of these states, the holding below, even if limited to CRSP power, in effect vests the Secretary with a power strongly to influence the direction, extent, and rate of

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[7] As noted *supra*, p. 5, the CRSP marketing area includes all of the states of Colorado, Wyoming, Utah, New Mexico, Arizona and parts of the states of California and Nevada.

development of the economies of these areas, with "the sole check on bureaucratic activity [being] 'the self-restraint of the executive branch.'" *Ralpho v. Bell*, D.C. Cir. No. 75-2088 (decided March 29, 1977), slip opinion, p. 15.[8]

The holding below extends, moreover, beyond CRSP power and embraces as well the power generated at the numerous major projects located throughout much of the Nation which is marketed by the Secretary under the Reclamation Laws. Not only does the holding below in effect license the Secretary to operate as a "free-wheeling agenc[y] meting [his] own brand of justice" in marketing that power (*Oestereich v. Selective Service System-Local Board No. 11*, 393 U.S. 233, 237 (1968)), but it sanctions the establishment of geographic preferences under the Secretary's general marketing authority for the first time in the extensive history of the Reclamation Laws dating back to 1902. Prior to the holding below, the Secretary had established geographic preferences in the marketing of particular blocks of power only pursuant to explicit statutory authority. Accordingly, review by this Court is fully warranted.

1. The holding below ignores the repeated rulings of this Court that in light of the Administrative Procedure Act's[9] "purpose to remove obstacles to judicial review," its "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51

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[8] A result of thus immunizing the Secretary from judicial review is to make him more vulnerable to political pressures. One of the issues raised by petitioners was that the Secretary had yielded to such pressures from Northern Division representatives in establishing the geographic preference. The Secretary appears to have so acknowledged in a letter dated December 18, 1969 to Congressman Harold Johnson:

> "It was at the insistence of potential preference customers of the Northern Division that the withdrawal provision in the marketing criteria for the Southern Division was established. * * * "

[9] The complaint alleged jurisdiction under 28 U.S.C. 1331, as well as the Administrative Procedure Act. Cf. *Ralpho v. Bell*, *supra*, slip opinion, pp. 11-13, fn. 51.

(1955). See, also, *e.g.*, *Heikkila v. Barber*, 345 U.S. 229, 232-33 (1953); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); cf. *Califano v. Sanders*, *supra*, at 984. As summarized in *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970):[10]

> "* * * As we said in *Data Processing Service*, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. * * * Indeed, judicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, we held that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' * * * It is * * * 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review. *Abbott Laboratories v. Gardner*, *supra*, at 141. * * "

Contrary to the holding of the court below (App. A, p. 36a), here, as in *Overton Park* (at p. 410):

> "* * * [T]here is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a * * * legislative intent' to restrict access to judicial review."

The Court of Appeals cites no evidence, let alone clear and convincing evidence, in support of its conclusion that

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[10] *Barlow* also negates the implication of the Court below (App. A, p. 10a), that the reference in the general preference provision in 43 U.S.C. 485h(c), *supra*, p. 2, to "in his judgment" in connection with the fixing of rates, is sufficient of itself to vest unreviewable discretion in the Secretary under that statute.

In *City of Fresno v. California*, 372 U.S. 627 (1963)(App. A. p. 16a), this Court upheld the Secretary's action, not because that action was unreviewable, but rather because upon review the Court found the Secretary's action to be within his discretion.

Congress intended to preclude judicial review. Instead, asserting that the test of reviewability was "whether Congress had provided a legal standard" for reviewing the Secretary's action (App. A, p. 15a), the court held that the directive provided in H. Rep. No. 1774, 83rd Cong., requiring that "all states of the Colorado River Basin * * * be placed on the *same basis*"[11] with respect to CRSP power was "so vague as to be meaningless," and accordingly, it rejected that directive as providing "no genuine limitation on the Secretary's discretion" (App. A, p. 36a).

But even if the "same basis" standard were in fact too vague, it might be a reason at most for questioning the validity of the delegation to the Secretary (*e.g., Panama Oil Co. v. Ryan,* 293 U.S. 388 (1935); *Schechter Corp. v. U.S.*, 295 U.S. 495 (1935); *National Cable Television Ass' n. v. United States,* 415 U.S. 336, 342 (1974)). It would not, however, support the conclusion below. To the contrary, even if the directive provided by Congress were too vague, it nevertheless remains the fact that Congress attempted to prescribe a standard and such Congressional action—even if it fell short of its objective—patently negates any inference that Congress intended to preclude judicial review. The fact of the matter is that a "same basis" standard is not unduly vague, particularly when read in the context of the House Committee's discussion of the problem generally. See *infra,* pp. 11-12.

Not only have the courts consistently approved far less definitive standards as not unduly vague (see, *e.g., Yakus v. United States,* 321 U.S. 414, 423-27 (1944); *Lichter v. United States,* 334 U.S. 742, 783-86 (1948); *F.P.C. v. New England Power Co.*, 415 U.S. 345, 353-54 (1974) (Marshall, J. concurring)), but here the "same basis" standard does not stand alone. In addition to the House Committee's directives, the Senate Committee in its Report No. 128, 84th Cong., dealing with the same problem, admonished (at p. 14) (1) that it "intends that *full equality of treatment be accorded both Upper and Lower Basin preference customers*" and (2) that "it is not intended that *Lower Basin* customers should be

[11] Emphasis supplied throughout unless otherwise indicated.

discriminated against in any respect." See also *infra.* pp. 13-14.

The "equality" and "non-discrimination" standards thus provided by the Senate Committee have a long history of utilization in connection, *inter alia,* with regulation of public utilities (see, *e.g.,* Section 205(a)(b) of the Federal Power Act, 16 U.S.C. 824d(a)(b)). Since their adequacy is firmly established even for constitutional purposes, such standards patently are not "so vague as to be meaningless" so as to preclude review of the geographic preference established in the Secretary's CRSP Marketing Criteria.

2. In addition to providing adequate standards for review of the Secretary's decision to establish a geographic preference, the extensive history of the CRSP legislation encompassing the 83rd and 84th Congresses is unusually explicit in providing a Congressional directive affirmatively to prohibit such preference. Since the limitations of a petition preclude discussion of all of the several evidences of such a directive and of all the distortions thereof by the Court of Appeals, reference is made to only certain highlights.

(a) To begin with, as the court recognized (App. A, pp. 23a-24a), the House Committee deliberately deleted proposals in the original CRSP bills[12] sponsored by Upper Basin representatives and by Interior to reserve permanently all CRSP power for the Upper Basin and to permit such power to be sold outside the Upper Basin only temporarily until needed by the Upper Basin. See H. Rep. No. 1774, 83rd Cong., 2d Sess., p. 22. While the striking of these preference provisions by itself *implicitly* evidences a rejection of a geographic preference for the Upper Basin states, the Committee did not leave the matter to implication. Instead, the Committee *explicitly* stated *(Ibid.)*:

> "By this amendment *all* States of the Colorado River Basin would be placed *on the same basis* with respect to acquiring electric power for the project."

[12] See Hearings before Irrigation and Reclamation Subcommittee of the House Committee on Interior and Insular Affairs on H.R. 4449, *et al,.* 83rd Cong., 2d Sess. at pp. 2-3, 6-7, and 10; H.Rep. No. 1774, 83rd Cong., 2d Sess., p. 26 *et seq.*

The House Committee adhered to this view throughout the course of the legislative process. In its report on the proposed legislation in the 84th Cong., the House Committee again reiterated (H. Rep. No. 1087, 84th Cong., 1st Sess., Part I at p. 18):

> "* * * All Colorado River Basin States are on the *same* basis with respect to acquiring electric power and energy for the project."

The House Committee thus reaffirmed that it had deleted the geographic preference provided in the original bills in order to assure that all the Basin States–Lower Basin as well as Upper Basin–be treated on an equal basis with regard to purchasing CRSP power.

The court below tried to minimize the force of these Committee statements by claiming that the House Committee deleted the proposed preference

> "* * * because it feared that they might unduly fetter the Secretary's discretion and hamper his efforts to achieve CRSP's underlying objectives. But the Committee did not prohibit the Secretary from adopting a geographic preference if at some time in the future he determined that such a preference was consistent with the policies of maximizing revenue and adhering to reclamation law preferences." (App. A, p. 25a).[13]

But the Court's rationalization erroneously injects a qualification upon the Committee's admonition that such deletion was intended to place all states in the Colorado River Basin *on the same basis* even though that admonition is unqualified, *i.e.*,

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[13]Contrary to the court's implication (App. A, p. 24a), petitioners make no claim that Arizona preference customers are entitled to a *preference* to CRSP power *vis a vis* the Upper Basin customers. Rather, their position is that Congress intended to place Arizona preference customers *on a parity with*–not at a disadvantage *vis a vis*–Northern Division preference customers with respect to the purchase of CRSP power.

permanent, on its face. In addition, it postulates for the House Committee the anomalous intent, *sua sponte*, to vest the Secretary with a discretion *far broader* than that sought by him in his proposed version of the legislation.

Finally, it ignores the Congressional understanding, clearly evidenced in the legislative history, that the proposed geographic preference would stand in the way of achieving Congress' dual objectives of "generating maximum power revenues while adhering to the reclamation law preference for public utilities" (App. A, p. 24a). As noted by the court below, the Bureau of Reclamation Regional Director Larson testified that preference customers in the Northern Division then had need for only ten percent of the CRSP power (App. A, p. 21a). Moreover, not only had the market studies made by the Federal Power Commission at the Secretary's request showed a ready market for much of the CRSP power in Arizona (H. Doc. No. 364, 83rd Cong., 2d Sess., pp. 21-22), but Representative Hosmer of California expressed fears, confirmed by Mr. Larson, that the purchasers in the Lower Basin would not pay as much for *withdrawable* power as they could for *permanent* power (Hearings on H.R. 4449 at p. 170).

(b) Far from questioning the House Committee's deletion of the geographic preference, the Senate Committee approved that deletion in clear and unambiguous language (S. Rep. No. 128, 84th Cong., 1st Sess., at p. 14):

> "The committee's position on power marketing of the project is that the area to be served shall be governed only by economical transmission distance direct or through interconnections with other plants either in the Upper or Lower Basin. This policy is necessary to the economic and financial health of the project. This policy in the Committee's opinion accords with established practice and policies of reclamation power operations. The committee intends that full equality of treatment be accorded to both Upper and Lower Basin power customers. Established preferences and sound business principles in accordance with existing reclamation law are intended to be applied in the marketing of power from the project, and it is not intended that

> Lower Basin customers should be discriminated against in any respect."

Again the court attempts to explain away this Senate report (App. A, pp. 28a-29a). But, again it is the court which "misses the point" (App. A, p. 28a). Note, first, the explicit statements (1) that "the committee intends that full *equality* of treatment be accorded to *both* Upper and Lower Basin power customers," and (2) that "it is *not intended* that *Lower Basin customers should be discriminated against in any respect.*" These statements are sufficiently clear, even by themselves, to demonstrate the Senate's agreement with the House that there should be no geographic preference in marketing CRSP power. Read in the context of the remainder of the legislative history, particularly the express rejection of the efforts of the Upper Basin and the Secretary to incorporate such a preference in the statute, there can be no doubt of the Congressional intent to prohibit the inclusion of such a preference.

Note, further, the Committee's observation that "this policy is necessary to the economic and financial health of the project" and its reference "to sound business principles." These obviously were directed both to the comments and testimony discussed *supra*, p. 14 , pointing out (1) that the Upper Basin preference markets could not possibly utilize all the CRSP power; and (2) that while there is a preference market for the CRSP power in the Lower Basin including Arizona, it is unlikely that that market would either take as much of or pay as high a price for, power on a withdrawable basis as it would on a permanent basis.

Read in the context of the above legislative history, the CRSP Act, and in particular Sections 4 and 7 thereof, clearly reflect a Congressional intent to prohibit the creation of a geographic preference to CRSP power for the Upper Basin. As the court below recognizes (App. A, pp. 15-17), Section 4 (*supra*, p. 2) makes applicable the preference provisions of the Reclamation Laws, and Section 7 (*supra*, p. 2) provides in pertinent part:

> "The hydroelectric power plants and transmission lines authorized by this chapter to be constructed, operated, and maintained by the Secretary shall be operated in conjunction with other Federal powerplants, present and potential, *so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates.* * * *"

Thus, these two provisions reflect the dual objectives of maximizing the revenues while adhering to the preference provisions. In accordance with the understanding manifested in the legislative history, a prohibition against geographic preference is a necessary component to the attainment of these objectives.

In sum, although, as the court below points out (App. A, p. 35a), the CRSP Act was intended to promote the Upper Basin, it was only with respect to the development of water. In contrast, the Upper Basin preference market for power was very limited. Accordingly, since power revenues were critical to support the water aspects of the project, Congress intended for water and power to be treated separately with the water benefits being directed primarily to the Upper Basin but the power to be marketed permanently—not on a withdrawable basis—throughout the entire marketing area without geographic preference in order to obtain the maximum revenues for the sale of CRSP power and energy.[14]

3. Finally, contrary to the court's implication (App. A, pp. 16a-17a), the Secretary does not have unreviewable authority under the Reclamations Laws generally to create geographic preferences such as that here involved,[15] much less

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[14] Contrary to the court's assertion (App. A, p. 25a), petitioners expressly pointed to and relied on the recognition in the Bureau's memorandum underlying the Marketing Criteria that even on the limited basis there studied, a Northern Division preference would reduce the revenues.

[15] As noted *supra*, p. 9, fn. 10, Section 485h(c)'s reference to "in his judgment" in connection with the fixing of rates, does not operate of itself to vest unreviewable discretion in the Secretary.

to establish such preferences free of judicial review. The fact is that although the Reclamations Laws date back to 1902, neither the Secretary nor the court has come forward with a single instance in which the Secretary has undertaken to prescribe a geographic preference to Interior-generated power without express statutory authority, much less any instances where such action has been held to be unreviewable.

Each of the few instances in which the Secretary has adopted such a geographic preference was pursuant to express statutory authority. For example, the geographic preference established with respect to the power generated by the Trinity River Division of the Central Valley Project was prescribed by Section 4 of the relevant statute (69 Stat. 719, 720), which expressly provides for "a first preference to the extent of 25 per centum of such additional energy * * * [for] preference customers in Trinity County, California, for use in that county."

Moreover, the Secretary's effort to include an express authorization in the CRSP Act itself reflects a recognition of the need for such specific authorization before such a preference could be established. This is the more so when viewed in light of the fact that the Trinity River statute was enacted in August 1955, *less than a year before the enactment of the CRSP Act in April 1956,* and accordingly, demonstrates a Congressional understanding as to the need to provide statutory authority when it desired to provide a geographic preference among preference customers.

As stated in the report of the special Consulting Board convened by the Secretary with regard to the marketing of certain Missouri River Basin power:[16]

> "There are, of course, many formulas that could be devised to make an allocation.
>
> * * *

[16] A copy of this report is attached to the affidavit submitted by the Commissioner of Reclamation Stamm in support of the Government motion for summary judgment in the District Court.

> "* * * *your Committee finds no Congressional intent to justify an allocation by states of the firm power now under consideration.*
>
> "(The Congress has provided, by the Flood Control and Water Supply Act of 1958, that on new dams not yet started a reasonable amount of power shall be made available for use within the state in which the dam is constructed. See Public Law 85-500, 85th Congress – July 3, 1958. This amendment does not apply to the power here under consideration.)
>
> "Your Committee believes that in this allocation all preference customers in the marketing area should be treated alike, insofar as possible, irrespective of their geographical location."[17]

So, also here, there is no "Congressional intent [under the Reclamation Laws generally] to justify an allocation by states" of the CRSP power, and hence the Reclamation Laws generally, like the CRSP Act itself, require that "all preference customers in the marketing area be treated alike, * * * irrespective of their geographic location" with respect to CRSP power.

[17] The reservation of power for the states in which the dam is constructed, provided in Public Law 85-500, referenced by the special Consulting Board, is still another illustration of our point that the general marketing provision is insufficient and specific legislation is needed before a geographic preference among preference customers may validly be established.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 24, 1977

APPENDICES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARIZONA POWER AUTHORITY; ELECTRICAL DISTRICT NO. 3, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT NO. 4, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT NO. 5, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT NO. 6, PINAL COUNTY, ARIZONA; WELLTON-MOHAWK IRRIGATION AND DRAINAGE DISTRICT; ROOSEVELT IRRIGATION DISTRICT; and CITY OF SAFFORD,

Plaintiffs-Appellants,

ELECTRICAL DISTRICT NO. 2, PINAL COUNTY, ARIZONA,

Intervenor-Plaintiff-Appellant,

VS.

ROGERS C. B. MORTON, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; and ELLIS L. ARMSTRONG, individually and as COMMISSIONER OF THE BUREAU OF RECLAMATION, UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

NORTHERN DIVISION POWER ASSOCIATION, INC.,

Intervenor-Defendant-Appellee.

No. 75-2141

OPINION

[January 17, 1977]

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING and WALLACE, Circuit Judges, and FERGUSON,* District Judge

WALLACE, Circuit Judge:

Water is the precious lifeblood of the Southwest.[1] In recognition of this fact, Congress has authorized several extensive proj-

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

[1] *See* Colorado River Water Conservation Dist. v. United States, ___ U.S. ___ (March 24, 1976) (slip op. at 2); Lichtenstein, Fight for Water in West Grows, N.Y. Times, Aug. 22, 1976, § 1, at 1, col. 2; *cf.* United States v. Tulare Lake Canal Co., ___ F.2d ___ (9th Cir. April 5, 1976).

ects for the development of the water resources of the Colorado River Basin, the principal drainage system of the region. One of these projects is authorized by the Colorado River Storage Project Act (CRSP), ch. 203, 70 Stat. 105 (1956), *as amended*, 43 U.S.C. §§ 620 *et seq.* A critically important incident of the damming and construction of storage reservoirs along the upper Colorado River pursuant to CRSP is the generation of hydroelectric power. We are called upon in this case to determine if and when the exercise of the Secretary of the Interior's authority under CRSP to contract for the sale of hydroelectric power is judicially reviewable.

On March 9, 1962, the Secretary of the Interior (Secretary) issued General Power Marketing Criteria (Marketing Criteria) which allocated the greater part of the power generated at CRSP hydroelectric plants to public utilities in the states of Colorado, Utah, New Mexico and Wyoming. Arizona Power Authority and eight other Arizona public utilities (referred to jointly as Arizona Power) brought suit against the Secretary[2] challenging this geographic preference. Both Arizona Power and the Secretary moved for summary judgment. In support of its motion and in opposition to the Secretary, Arizona Power contended first that the implementation of the geographic preference was beyond the Secretary's authority and, second, assuming that it was within his authority, that the Marketing Criteria were arbitrary and unreasonable as a matter of law. Arizona Power also argued that there were material issues of fact in dispute on its second contention that precluded granting the Secretary's motion for summary judgment. The district court rejected these arguments and granted summary judgment in favor of the Secretary.[3]

On appeal, the Secretary specifically articulates a new argument: the issuance of the Marketing Criteria was agency action

[2]The Commissioner of the Bureau of Reclamation was also named a party defendant. The suit sought declaratory and injunctive relief.

[3]The Secretary initially argued that the action was barred under the doctrines of laches and estoppel, but withdrew these issues from consideration for purposes of deciding the cross-motions for summary judgment. The Secretary had also argued that the United States had not waived its sovereign immunity with respect to this action, but this jurisdictional defense was apparently withdrawn before the grant of summary judgment and the district court did not reach the issue. Neither were these issues raised on this appeal.

committed to agency discretion by law and thus not judicially reviewable under the Administrative Procedure Act § 10, 5 U.S.C. § 701(a) (2). We agree and therefore vacate the judgment of the district court.

I. Factual Background

CRSP was enacted with reference to several interstate compacts and federal reclamation projects which involve the Colorado River Basin. As a result, CRSP is complex and its interpretation presents difficult issues that can be highlighted by briefly outlining federal and multi-state activity in the basin.

A. The Law of the Colorado River

Comprehensive development of the Colorado River Basin requires the cooperation of seven states. The Colorado River begins in the mountains of Colorado and flow southwesterly for approximately 1,400 miles through Colorado, Utah, Arizona, along the Arizona-Nevada and Arizona-California boundaries before entering Mexico and emptying into the Gulf of California. Tributaries originating in Wyoming, Colorado, Utah, Nevada, New Mexico and Arizona define the boundaries of the basin, which comprises an area about 900 miles long from north to south and 300 to 500 miles wide from east to west—approximately one-twelfth the area of the contiguous United States. The basin is arid and has historically been dependent upon water management practices in order to be productive and inhabitable. H.R. Rep. No. 1312, 90th Cong., 2d Sess. 5-6 (1968), *reprinted in* 1968 U.S.C. Cong. & Admin. News 3666, 3671-72; *Arizona v. California*, 373 U.S. 546, 552 (1963).

With the rapid settlement and development of the basin at the end of the nineteenth century it became clear that small scale diversion works would not be sufficient to provide a dependable year-round water supply. The erratic nature of the river flows which could bring either drought or flood, the problem of land erosion and silt deposits, and the physical impediments of deep canyons and long distances from river to community were barriers too great for small groups of farmers or even individual states to surmount. It was soon recognized that the task of constructing storage dams, canals and various irrigation and power

works required the economic and engineering resources of the federal government.[4]

While the prospect of federal intervention and funding was appealing to all of the basin states, it brought to the forefront the competition between the upper and lower basin states for the beneficial use of Colorado River water. Because the prevailing water law of the western states was prior appropriation, rather than riparian rights or equitable allotment, rights to Colorado River water would likely be based on a "first in time, first in right" principle.[5] The upper basin states thus feared that the surplus waters stored by federal projects would initially be diverted to the more rapidly growing lower basin states, principally California, and thereby permanently appropriated to the exclusion of any future use to meet increased demands in the upper basin states. The states therefore agreed to negotiate an interstate compact for allocation of the water.[6] Congress consented to the negotiations, Act of August 19, 1921, ch. 72, 42 Stat. 171, and in 1922 the states completed an agreement termed the Colorado River Compact. 70 Cong. Rec. 324 (1928) (text of agreement).

The Compact failed to allocate the waters on a state-by-state basis but did achieve a compromise position. The basin was divided into two parts at Lee's Ferry, a point on the Colorado River in northernmost Arizona. Art. II(e)-(g). What is referred to as the upper basin is drained by the Colorado River and its tributaries above Lee's Ferry and includes parts of Wyoming, Colorado, Utah, New Mexico and the northeast corner of Arizona. The Compact defines the lower basin as parts of Nevada, Cali-

[4]A report on irrigation possibilities in the Imperial Valley stated: "The control of the floods and development of the resources of the Colorado River are peculiarly national problems . . . ." S. Doc. No. 142, 67th Cong., 2d Sess. 1 (1922). The report concluded that these "problems are of such magnitude as to be beyond the reach of other than national solution." *Id.*

[5]*See* Wyoming v. Colorado, 259 U.S. 419 (1922) (prior appropriation rule given interstate effect); Nebraska v. Wyoming, 325 U.S. 589 (1945) (same).

[6]An interstate compact had not previously been used for the apportionment of waters of an interstate stream. H.R. Rep. No. 1312, *supra*, at 7, *reprinted* in 1968 U.S.C. Cong. & Admin. News 3673.

fornia, New Mexico, Utah and substantially all of Arizona.[7] The upper and the lower basin were each apportioned the exclusive beneficial consumptive use of 7,500,000 acre-feet of water a year. Art. III(a).[8]

The Compact did not at first achieve the required unanimous ratification by the seven states because of Arizona's failure formally to approve.[9] Congress nevertheless consented to the Colorado River Compact and waived the seven-state approval requirement of the Compact when it enacted the Boulder Canyon Project Act (BCPA). Cr. 42, §§ 4a & 13, 45 Stat. 1058, 1064 (1928), 42 U.S.C. §§ 617c(a) & 617l(a). California and five states approved the Compact pursuant to the conditions of the BCPA,

[7]The Compact also divided the basin into two other parts: states of the *upper division*—Colorado, Utah, Wyoming and New Mexico—and states of the *lower division*—Arizona, California and Nevada. Art. II(c) & (d). Arizona lies within both the upper and lower basins but is a state of only the lower division. This distinction in terminology is the cause of considerable confusion in the legislative history of CRSP.

The Marketing Criteria allocated the power on a geographic basis, using a northern and southern division terminology that is similar to the upper and lower division scheme of the Compact. The Marketing Criteria treat Arizona as a southern division state. The text of CRSP adopts both the upper basin and upper division terminology of the Compact, § 16, 70 Stat. 111, but at the same time refers to the development of water resources for the benefit of "States of the Upper Basin," § 1, 70 Stat. 106, while defining that term to include Arizona, § 16, 70 Stat. 111. As described *infra*, we think that CRSP was designed principally for the benefit of four upper basin states—Colorado, Utah, Wyoming and New Mexico, *i.e.*, the upper (northern) division states—and not for the benefit of the fifth upper basin state, Arizona.

[8]Because the annual volume of Colorado water varies significantly, Art. III(d) prohibited the upper division states from causing the water at Lee's Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years.

[9]The allocation of water between the lower basin states of California and Arizona remained a disputed issue, as did Arizona's claim that its tributaries (principally the Gila River) should not be required to contribute to water obligations the United States owed to Mexico. *Hearings on H.R. 5773 Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 70th Cong., 1st Sess. 30-31, 402-05 (1928). These issues were eventually resolved in Arizona's favor in the Boulder Canyon Project Act, ch. 42, § 4(a), 45 Stat. 1058 (1928), 43 U.S.C. § 617c(a).

and the BCPA thereafter became effective by presidential proclamation. 46 Stat. 3000 (1929).[10]

Section 1 of the BCPA, 43 U.S.C. § 617, authorized the Secretary to construct a Boulder or Black Canyon Dam[11] and other projects in the lower basin for flood control, reclamation and production of hydroelectric power. Importantly, the BCPA resulted in an allocation of mainstream waters among the lower basin states of Nevada, California and Arizona.[12] This allocation had the effect of facilitating development of lower basin water resources by removing an issue of controversy among the lower basin states.[13]

Lower basin development proceeded at a rapid pace. The lakes behind Parker Dam and Davis Dam[14] on the lower Colorado River joined Lake Mead behind Hoover (Boulder) Dam[15] as major storage reservoirs. These projects provide water and power for large metropolitan areas (such as Los Angeles and San

[10]The Colorado River Compact was subsequently ratified by Arizona in 1944. H.R. Rep. No. 1312, *supra,* at 10, *reprinted in* 1968 U.S.C. Cong. & Admin. News, at 3676.

[11]The dam was at one time called Boulder Dam but is now titled Hoover Dam, Act of April 30, 1947, ch. 46, 61 Stat. 56.

[12]The provisions of § 4(a) of the BCPA authorized Arizona, California and Nevada to enter into a compact to divide the lower basin share of 7,500,000 acre-feet of mainstream waters so that California would receive 4,400,000 acre-feet a year, Arizona 2,800,000, and Nevada 300,000, with California and Arizona each getting one-half of any surplus. 43 U.S.C. § 617e(a). Although the three states never agreed to such a compact, the Supreme Court construed § 4(a), together with § 5 which grants the Secretary authority to contract for the sale of water, as indicating a congressional intent to apportion the lower mainstream waters in the same ratio as that described in the authorized, but never executed, tri-state compact. Arizona v. Colorado, *supra,* 373 U.S. at 564-65.

[13]While certain provisions of the BCPA remained to be interpreted in the *Arizona v. California* litigation, *supra,* California had already agreed to be limited to a minimum of 4,400,000 acre-feet a year. California Limitation Act, Cal. Stat. 1929, ch. 16. at 38. The Supreme Court in *Arizona v. California* decided how any surplus waters would be measured and apportioned.

[14]*See* Act of May 28, 1954, ch. 241, 68 Stat. 143 (consolidation of the two dam projects).

[15]*See also* Boulder Canyon Project Adjustment Act, ch. 643. 54 Stat. 774 (1940), *as amended,* 43 U.S.C. §§ 618 *et seq.*

Diego) and extensive agricultural districts in southern California and Arizona. S. Rep. No. 1983, 83d Cong., 2d Sess. 2 (1954).

Development in the upper basin, however, moved more slowly. The erratic flow of the river, fluctuating between periods of drought and flood, made it impractical to meet the annual 7,500,000 acre-feet obligation to the lower basin states without river control on a long-term holdover basis. The necessity of holdover storage reservoirs was accentuated by the fact that the periods of high flows do not occur when the demands for the water are greatest. Without such reservoirs, development in the upper basin was limited to small irrigation projects usually constructed by private groups. H.R. Rep. No. 1774, 83d Cong., 2d Sess. 10-11 (1954).

A significant barrier to comprehensive upper basin development was overcome by ratification of the Upper Colorado River Basin Compact in 1948.[16] This compact apportioned among the states of Arizona, Colorado, New Mexico, Utah and Wyoming the consumptive use of waters allocated to the upper basin by the Colorado River Compact. Over 99 per cent of the upper basin allotment was divided among the so-called upper division states[17] of Colorado, New Mexico, Utah and Wyoming.[18] This apportionment made possible the Colorado River Storage Project Act in 1956. *See Friends of the Earth v. Armstrong,* 485 F.2d 1, 4-6 (10th Cir. 1973), *cert. denied,* 414 U.S. 1171 (1974).

CRSP provided a plan for long-term development. It authorized construction of a number of projects for flood control, reclamation and extended irrigation, municipal and industrial water needs, and hydroelectric power. A series of holdover storage reservoirs with hydroelectric plants, transmission facilities, and incidental works were authorized. The legislation also established priorities for planning and constructing additional reclamation works that would serve as participating projects. §§ 1-2, 43 U.S.C. § 620-620a. In regulating the flow of the upper Colorado for

[16]Congress consented to the Upper Basin Compact. Act of April 6, 1949, ch. 48, 63 Stat. 31.

[17]*See* note 7, *supra.*

[18]Under the Upper Basin Compact, Arizona receives 50,000 acre-feet annually. The excess is apportioned among the other states as follows: Colorado, 51.75 per cent; Utah, 23 per cent; Wyoming, 14 per cent; and New Mexico, 11.25 per cent. Art. III(a), 63 Stat. 32.

beneficial consumptive uses and for the generation of hydroelectric power,[19] all authorized projects were to be operated in conformity with the law of the Colorado River—*i.e.*, the Colorado River Compact, Upper Colorado River Basin Compact, Boulder Canyon Project Act, Boulder Canyon Project Adjustment Act, and certain other agreements. §§ 1, 7, 9, 14, 43 U.S.C. §§ 620, 620f, 620h, 620m.

Four hydroelectric facilities subject to the CRSP Marketing Criteria have already been constructed. The largest is Glen Canyon Dam on the Colorado River just below the Utah-Arizona border and north of Lee's Ferry. Flaming Gorge Dam in Utah is located on the Green River just below the Wyoming-Utah border. The Curecanti unit is composed of three dams and reservoirs on the Gunnison River in Colorado: Blue Mesa and Morrow Point Dams, both completed, and Crystal Dam, presently under construction. The Glen Canyon and Flaming Gorge dams and the Curecanti units will have a combined firm electric power[20] generating capacity of about 1,260,000 kilowatts, with Glen Canyon having the largest capacity, 900,000 kilowatts. The Bonneville unit of the Central Utah participating project, which is yet to be constructed, is also included in the CRSP Marketing Criteria.[21]

Although CRSP describes the generation of hydroelectric power as "an incident" of the storing of water for flood control, reclamation and other consumptive uses, § 1, 43 U.S.C. § 620, power production is nevertheless a principal purpose of the legislation. H.R. Rep. No. 1774, *supra*, at 11; *cf. Friends of the Earth v.*

[19]Consumptive usage of water is usually measured by the amount of diversion less return. In the generation of electrical energy the water used is returned to the river and therefore is not considered a consumptive use.

[20]Firm energy is dependable energy and is calculated on the basis of anticipated stream flow. Secondary or dump energy is undependable energy that is created by waters in excess of the anticipated stream flow.

[21]Congress has enacted additional legislation for the further development of the upper basin. *See, e.g.*, Navajo Indian Irrigation Project, Pub. L. 87-483, 76 Stat. 96 (1962), 43 U.S.C. §§ 615ii *et seq.*; Fryingpan-Arkansas Project, Pub. L. 87-590, 76 Stat. 389 (1962), 43 U.S.C. §§ 616 *et seq.*; Colorado River Basin Project, Pub. L. 90-537, 82 Stat. 886 (1968), 43 U.S.C. §§ 1501 *et seq.*

Armstrong, supra, 485 F.2d at 4, 6. Congress intended CRSP hydroelectric power to serve not only as an energy source for the ever-increasing demands of the upper basin area but also as a revenue producer that would repay the federal investment in the power features of the project. Indeed, surplus power revenues were projected to help reimburse the costs of CRSP attributable to irrigation features and to aid in funding an Upper Colorado River Basin Fund that would defray the costs of basic units and participating projects of CRSP. §§ 5, 6, 13, 43 U.S.C. §§ 620d, 620e, 620l. Congress considered power revenues to be the most important financial aspect of CRSP.[22]

Power generated by CRSP facilities is sold by the Bureau of Reclamation to power utilities who in turn wheel and sell the power to the ultimate consumers. CRSP provides two general guidelines for the sale of power. The first is set out explicitly in Section 7 of the Act: CRSP plants are to be operated "so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates" consistent with the law of the Colorado River. 43 U.S.C. § 620f. The second guideline is referred to in Section 4 of the Act: absent exculpatory provisions, CRSP plants are to be operated in conformity with

[22]Power revenues over a fifty-year period were projected to reach a total of $1,075 million. This sum would return the $442.7 million capital investment in power facilities and the interest on that investment, about $320 million. It would also repay the non-interest-bearing cost attributable to the construction of irrigation works that would not be repaid by irrigation users' fees ($282.8 million minus $36.6 million). Interest on the construction charges for irrigation features are not reimbursable as a general policy of federal reclamation law. *Cf.* Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649, *as amended*, 43 U.S.C. § 423e; Act of Aug. 4, 1939, ch. 418, § 9(d)-(e), 53 Stat. 1193, *as amended*, 43 U.S.C. § 485h(d)-(e); H.R. Rep. No. 1774, *supra*, at 11-12. CRSP likewise adopts this policy. *See* § 5(d), 43 U.S.C. § 620d(d).

Congress thought municipal water revenues sufficient to return the municipal water allocation of $41 million with interest. After the CRSP cost outlay of $760 million, § 12, 43 U.S.C. § 620k, has been completely reimbursed, net power revenues are expected to total $15 million to $20 million annually. Thus, in the long run, power revenues will not only ensure the return of the federal investment, but will also return a profit that can fund other works in the upper basin. H.R. Rep. No. 1087, 84th Cong., 1st Sess., pt. 1, 8-13 (1956), *reprinted in* 1956 U.S.C. Cong. & Admin. News 2346, 2354-59.

federal reclamation law. 43 U.S.C. § 620c. Section 4 therefore incorporates Section 9 of the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1193, 43 U.S.C. § 485h(c).

This section of the Reclamation Project Act (§ 485h(c)) imposes a number of restrictions on the marketing of power. It defines a class of "preference" customers who shall have the first opportunity to purchase hydroelectric power generated by federal reclamation projects. This class of preference customers comprises:

> municipalities and other public corporations or agencies and . . . cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936.

Id. The priority accorded to public utilities (preference customers) is by now an important aspect of federal reclamation projects. Section 485h(c) also sets a maximum term of forty years for contracts for the sale of power or lease of power privileges and sets out criteria for rate-making. Furthermore, Section 485h (c) forbids the making of any contract relating to electric power or power privileges "unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." Neither Section 7 of CRSP nor Section 485h(c) makes any reference to the impermissibility of geographic preferences in the sale of power.

B. Formulation of the Marketing Criteria

Shortly after the enactment of CRSP, the Federal Power Commission began survey of markets and transmission facilities for CRSP hydroelectric power. The region selected for study included Colorado, New Mexico, Utah, Wyoming, Arizona, the southern part of Nevada, and small portions of Idaho and Texas. Representatives of preference customers in Colorado, New Mexico, Utah, Wyoming and Arizona assisted in supplying data. The survey, entitled "Power Market Survey—Colorado River Storage Project" (Market Survey), was completed in June 1958.

The Bureau of Reclamation submitted recommendations based upon Market Survey data to the Secretary in a May 1960 memorandum. Bureau of Reclamation. Memorandum to Secretary of the Interior re Colorado River Storage Project (May 3,

1960) (1960 Memorandum). This memorandum proposed that the primary marketing area for CRSP power be in the "northern division" states of Wyoming, Colorado, Utah and New Mexico. Because preference customers in these states did not need all of the CRSP power, however, the memorandum recommended that the excess be sold to preference customers in the "southern division" states of Arizona, California and Nevada.[23] Power sold in this secondary marketing area was to be withdrawn as needed by preference customers in the northern division. The memorandum proposed, however, that the southern division receive a minimum allocation of 7 per cent of CRSP output in the winter months and 20 per cent in the summer.

In recommending this geographic preference, the memorandum took into account those portions of the legislative history of CRSP which declared that all Colorado River Basin states should be on the "same basis" with respect to acquiring power. *See* Section II, D *infra*. It noted, however, "that no definite instructions as to the market area were specified by the Congress in the legislation itself." It also gave "considerable weight" to the fact that power from the large Hoover Dam and Parker-Davis Projects was already committed to the lower basin states. The memorandum concluded that "the over-all, closer balance among the states of the Colorado River Basin, that would result [from the recommended geographic preference], would achieve a more desirable result [than pro rata division among all the states]." 1960 Memorandum, *supra*, at 13.

The Marketing Criteria announced on March 9, 1962, by Secretary Stewart Udall follow generally the policy set forth in the 1960 Memorandum. Preference customers in the southern division states are guaranteed a minimum of 20 per cent of summer

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[23] Supplying power from CRSP projects to the lower basin states would require an intertie between CRSP transmission lines and the transmission lines of the Hoover Dam and Parker-Davis projects in the lower basin. In addition to facilitating interim use of CRSP power, the interties would increase overall efficiency of Colorado River Basin power marketing because the peak load in the southern division occurs in the summer (July) while the peak load in the northern division occurs in the winter (December). Thus, power from lower and upper basin projects could be marketed to meet the peak loads of the respective divisions on a year-round basis. 1960 Memorandum, *supra*, at 10-12.

CRSP power and 7 per cent of the winter supply. Until the northern division preference customers need their full allotments, the excess power is to be marketed in the southern division, subject to withdrawal on three years' notice.[24] As a condition for acquiring CRSP power, southern division customers must acknowledge the principle of withdrawal.[25]

The Secretary sent application forms for the purchase of CRSP power to all prospective preference customers in both

[24]The Marketing Criteria provide in part:

> Recapture, at any time, after not less than three years advance notice, of firm power and energy under contract to preference customers in the Southern Division; provided that recapture will cease when commitments of firm power and energy in the Southern Division have been reduced to amounts not exceeding in the aggregate 7 per cent of project capability during the winter season and 20 per cent of project capability during the summer season, or such respective amounts as determined by the following adjustment procedure. The winter maximum of 7 per cent of project capability may be adjusted downward, and the summer maximum of 20 per cent may be adjusted upward by an amount equal to the downward adjustment, as the difference between the summer and winter peak loads of the Northern Division increases above 13 per cent of project capability. There will be no adjustment to increase the Southern Division winter minimum of 7 per cent or reduce the Southern Division summer maximum of 20 per cent if the difference between winter and summer loads of the Northern Division decreases below 13 per cent of project capability. The total amount of the recapture will be spread proportionately among all preference customers of the Southern Division unless the customers themselves agree in advance on some other methods not adverse to the interests of the United States . . . . Project capability is defined for the purposes of withdrawal as the dependable capacity (reduced by transmission losses to delivery points) of storage project powerplants as determined by the Bureau from reservoir elevations.

Id., § 4(D) (3).

[25]The Marketing Criteria provide in part:

> Prior to initiation of construction of transmission lines into the Southern Division, or in the alternative, of arrangements for delivery of power to customers in that Division by other means, specific assurances shall be obtained from prospective customers in the Southern Division that the principle of withdrawal set out in subsection D(3) of this Section 4 will be applicable to allotments to, and contracts for, the sale of power to such customers.

Id. § 4(D) (4).

divisions. The forms contained a clause acknowledging the Secretary's discretionary authority to withdraw power allotments. Arizona Power Authority returned its forms with this clause stricken and was refused power allotments. Subsequent negotiations to allot power to the Authority as a pooling agent for the ultimate customers terminated after the Bureau negotiated contracts directly with the Authority's customers. Eight of the nine plaintiffs subsequently entered into contracts acknowledging the principle of withdrawal. A total of 27 southern division customers and 58 northern division customers entered into contracts with the Bureau of Reclamation.[26]

After execution of the contracts, the Bureau offered to sell to the eight plaintiffs all the power needed to satisfy their customers' requirements. In December 1970, however, the Bureau notified all of its southern division customers that it would give notice not later than March 1973 that power in excess of the summer 20 per cent minimum would likely be withdrawn beginning with the 1976 summer season. The withdrawal would decrease the power allocated to the southern division from approximately 335,058 to 252,000 kilowatts.

C. The Trial Court Proceedings

In June 1971 Arizona Power Authority met with the other plaintiffs and they jointly decided to protect the proposed withdrawal as illegal and beyond the Secretary's authority. Seven of the plaintiffs who had contracted with the Bureau then notified the Secretary that they would contest any withdrawal of power. Arizona Power Authority, on behalf of the contracting customer plaintiffs, also informed the Secretary of its intention to contest the legality of the geographic preference policy of the Markeing Criteria.

This suit was filed by Arizona Power[27] in December 1971 seeking an injunction and declaratory judgment against the

[26]The number of utilities receiving power is actually higher since some of the contracting customers are pooling associations which represent a number of other preference customers.

[27]Seven of the plaintiffs joined the Authority in filing the complaint. On August 3, 1973, the district court filed an order granting the motion of Electrical District No. 2, Pinal County, to intervene.

Secretary and the Commissioner of the Bureau of Reclamation.[28] The district court granted summary judgment for the Secretary in May 1975. This appeal followed.[29]

II. Jurisdiction

A. *Judicial Review of Administrative Action*

The first question before us is whether we have jurisdiction to review the action of the Secretary in this case. The Secretary contends on appeal that the formulation of the geographic preference in the Marketing Criteria is unreviewable agency action. He relies on the Administrative Procedure Act, 5 U.S.C. § 701 (a) (2), which precludes judicial review of "agency action . . . committed to agency discretion by law." In short, the Secretary contends that the courts are without jurisdiction to interfere with his decision.

The provision upon which the Secretary relies, § 701(a) (2), states a narrow exception to judicial review applicable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1970). If "there is no law to apply," there are no issues susceptible of judicial resolution, and accordingly the courts are denied jurisdiction over the matter. *See* K. Davis, Administrative Law Text § 28.05, at 515-16 (3d ed. 1972). In deciding whether agency action is committed to agency discretion by law, it is not significant that there may be law, in the abstract, that could possibly be applied. *Strickland v. Morton,* 519 F.2d 467, 470 & n.4 (9th Cir. 1975). Instead, we must determine whether in this particular case there is any specific law to apply. *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 410. As we stated in *Strickland v. Morton, supra,* 519 F.2d at 470, another case examining the scope of § 701(a) (2):

> When a court is asked to review agency action in instances where considerable discretion is committed by statute to an official, the court lacks jurisdiction due to the provisions of § 701(a) (2) only when the agency action of which

[28]The district court granted Northern Division Power Association, Inc., representing 58 preference customers in the northern division, leave to intervene as a defendant.

[29]We ordered the Secretary to maintain the status quo of CRSP power deliveries to Arizona Power pending completion of our review.

> plaintiff complains fails to raise a legal issue which can be reviewed by the court by reference to statutory standards and legislative intent. Where a statute grants broad discretion to an administrative official, absent some action *clearly* contradictory to a statutory provision or legislative intent . . . a plaintiff challenging an exercise of that discretion may find it an all but insurmountable task to be able to bring his case within this standard, but unless he does so § 701(a) (2) deprives the courts of jurisdiction to entertain his cases.

(emphasis in original, citations omitted). *See also Ness Investment Corp. v. United States Department of Agriculture,* 512 F.2d 706, 714-15 (9th Cir. 1975); *Bronken v. Morton,* 473 F.2d 790, 794, 797 (9th Cir. 1973); *Ferry v. Udall,* 336 F.2d 706, 712 (9th Cir. 1964), *cert. denied,* 381 U.S. 904 (1965).

Thus, the issue before us is whether Congress has provided a legal standard that we may apply in reviewing the Secretary's formulation of the geographic preference in the Marketing Criteria. If Congress has not provided such a standard but has rather granted broad discretion to the Secretary, the Secretary's action, unless "clearly contradictory to a statutory provision of legislative intent," is not reviewable by us.

B. *Scope of the Secretary's Discretion*

It is apparent that Congress has imposed some restrictions on the Secretary's discretion to market hydroelectric power. Section 7 of CRSP requires that plants be operated with other federal power plants "to produce the greatest practicable amount of power . . . that can be sold at firm power . . . rates."[30]

[30]We note that we have construed the phrase "the most feasible plan," in a grant of authority to the Secretary to plan a project for the acquisition of power needed for irrigation pumping, as endowing the Secretary "with almost unlimited authority in orchestrating all phases of the project." Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721, 727 (9th Cir. 1975), *cert. denied,* — U.S. — (April 5, 1976). However, there the Secretary had the option of recommending the construction of power plants and purchase of hydroelectric and thermal power from non-federal interests. Colorado River Basin Project Act, Pub. L. 90-537, § 303(a)-(b), 82 Stat. 889 (1968), 43 U.S.C. § 1523(a)-(b). Here the Secretary is delegated only the authority to operate the already constructed federal power plants so as to produce the greatest possible amount of firm power; accordingly, his discretion may be somewhat narrower.

Section 7 also requires the Secretary to observe the compacts and statutes comprising the "law of the Colorado River." Further, the use of water for generating hydroelectric power "shall [not] preclude or impair the appropriation of water for domestic or agricultural purposes pursuant to applicable State law." In addition, Section 485h(c) of the Reclamation Act sets a minimum rate and defines a class of preference customers who have priority in purchasing power. *Arizona Power Pooling Association v. Morton,* 527 F.2d 721, 726-28 (9th Cir. 1975).

Had Arizona Power alleged that the Secretary violated any of these restrictions, we would have jurisdiction to review his action. *See Arizona Power Pooling Association v. Morton, supra,* 527 F.2d at 726-28. But Arizona Power makes no such allegation.[31]

Within the restrictions just outlined, it appears that the Secretary has considerable discretion. For example, the Supreme Court has held that rates for the sale of power above a defined minimum *(see* 43 U.S.C. § 485h(c)) are to be set "in the Secretary's judgment" and contracts for sale may be made for any term less than 40 years. *City of Fresno v. California,* 372 U.S. 627, 631-32 (1963). Also, although it is true that Section 485h(c) forbids the Secretary from making any contract for the sale of power that would "in [his] judgment . . . impair the efficiency of the project for irrigation purposes," *id.* at 630, we have held that this grant of discretion is broad enough to permit the Secretary to bypass the preference customer priority when sales to preference customers would impair project efficiency. *Arizona Power Pooling Association v. Morton, supra,* 527 F.2d at 727. Further, the Supreme Court has also said that the "general authority to make contracts normally includes the power

[31]Arizona Power suggests that the Secretary has not contracted for the sale of the greatest practical amount of firm power. It alleges that 102,070 of the 1,007,000 kilowatts of power allocated to the northern division has not been contracted for sale. This suggestion is groundless. The 102,070 kilowatts of power have not been sold because it is to be generated from Crystal Dam and Morrow Point power plant facilities which are not yet generating power.

to choose with whom . . . the contracts will be made." *Arizona v. California, supra,* 373 U.S. at 580.[32]

Unless Arizona Power can establish its contention that Congress has prohibited the Secretary from taking a customer's location into account in marketing CRSP power, it would appear in light of his broad discretion that the Secretary may adopt whatever geographic preference he desires and that we have no jurisdiction to review his action.

C. Text of CRSP

Turning first to the text of CRSP, we find no prohibition of geographic preferences. It is clear that if Congress wanted to specify a geographic basis for disposition of hydroelectric power it knew how to do so. The same Congress that enacted CRSP also authorized the Secretary to construct a Trinity River Division of the Central Valley Project of California. Act of Aug. 12, 1955, ch. 872, 69 Stat. 719. Section 4 of that act specifically requires that preference customers in Trinity County receive 25 per cent of the power generated by the Trinity River Division.[33] Thus, if Congress had desired in the text of CRSP to allot Arizona or the lower basin states a specified amount of power, it had a recent precedent to guide it.[34] No such explicit prohibition of geographic preferences appears, however, nor does Arizona Power allege that the geographic preference is inconsis-

[32]The Court stated further:

> When Congress in an Act grants authority to contract [for the sale of Colorado River water], that authority is no less than the general authority, unless Congress has placed some limit on it.

Arizona v. California, *supra,* 373 U.S. at 580.

[33]Section 4 states in part:

> Contracts for the sale and delivery of . . . electric energy . . . shall be made in accordance with preferences expressed in the Federal reclamation laws: Provided, That a first preference, to the extent of 25 per centum of such . . . energy, shall be given, under reclamation law, to preference customers in Trinity County, California, for use in that county . . . .

69 Stat. 720.

[34]Congress also had precedents in areas other than hydroelectric power. Statutes enacted at earlier dates included specific allocations of Colorado River water among the basin states. *See, e.g.,* Boulder Canyon Project Act, ch. 48, 45 Stat. 1058 (1928), 43 U.S.C. §§ 617 *et seq.*

tent with any of the explicit statutory restrictions on the Secretary's discretion. We do not find in the text of CRSP, therefore, any legal standard to apply to the Secretary's action.

D. Legislative History of CRSP

Arizona Power strenuously argues that a congressional intent to prohibit geographic preferences is clearly stated in the legislative history of CRSP. It relies most heavily on a statement of the House Committee on Interior and Insular Affairs analyziing Section 7 of CRSP: "All Colorado River Basin States are on the same basis with respect to acquiring electric power and energy from the project." H.R. Rep. No. 1087, 84th Cong., 1st Sess. 16 (1955), *reprinted in* 1956 U.S.C. Cong. & Admin. News 2346, 2362.[35] Arizona Power contends that the Secretary is thus required to treat each basin state on the "same basis" and that this is the standard we are to apply in reviewing the Secretary's action in this case. When the quoted statement is read out of context, Arizona Power's contention has some force. But after examining the legislative history as a whole, we conclude that Arizona Power has failed to carry its burden of demonstrating that the Marketing Criteria are "clearly contradictory to legislative intent." *Strickland v. Morton, supra,* 519 F.2d at 470.

1. Political and Economic Context of the Congressional Debates

The debates on CRSP in general and Section 7 in particular focused on two major issues: the feasibility of marketing hydroelectric power and the application of reclamation law preferences. The first issue was highlighted by an economic struggle between the upper basin states on the one hand, and, on the other, southern California interests and representatives of various non-western states. The non-western states were concerned about the utility and fairness of appropriating $750 million in federal

[35]CRSP was an enactment of S. 500, 84th Cong., 1st Sess. (1955). The Senate bill, however, was passed in lieu of H.R. 3383, 84th Cong., 1st Sess. (1955), after substituting for its language the text of the House bill. *See* H.R. Conf. Rep. No. 1950, 84th Cong., 2d Sess. 3 (1956), *reprinted in* 1956 U.S.C. Cong. & Admin. News 2422, 2425. Thus, the report of the House committee is, in a sense, the most definitive statement of legislative intent among the various committee reports on CRSP.

funds for another project designed only for the benefit of the states of the Colorado River Basin. It was argued that the cost per unit of irrigable land to be reclaimed was particularly high. CRSP advocates responded that power revenues would return most of the federal investment, and, therefore, the feasibility of marketing hydroelectric power became a crucial issue.

The southern California interests joined in attacking the feasibility of marketing hydroelectric power in the region. *See* 102 Cong. Rec. 3736 (1956) (remarks of Rep. Udall). Southern California had been the prime beneficiary of the upper basin states' failure to consume the water allocated to them under the Colorado River Compact and Boulder Canyon Project Act. *See id.* at 3506-07 (reprint of Holmes article). This unconsumed water was flowing into projects on the lower Colorado River and being used to generate cheap secondary or "dump" power. This power was being sold to southern California utilities at rates much lower than those for firm power generated at Colorado River projects. If the upper basin states were to have projects consuming their share of Colorado River water, southern California would be deprived in large part of its access to less expensive dump power. H.R. Rep. No. 1087, *supra,* at 2, *reprinted in* 1956 U.S.C. Cong. & Admin. News, at 2347.

The southern California interests attacked the feasibility of marketing CRSP power by contending that it would have to be sold at relatively high rates which would not be competitive with rates for alternative energy sources. They also argued against investing in public projects when the upper basin was endowed with vast deposits of thermal energy resources, such as coal and oil shale, that could be developed by the private sector. Finally, they contended that potentially low-cost nuclear power developments in the uranium-rich upper basin would provide serious long-term competition. *See, e.g.,* H.R. Rep. No. 1087 (minority reports), *supra,* at 37-41, 53, 58-59, *reprinted in* 1956 U.S.C. Cong. & Admin. News, at 2383-87, 2399, 2404-05.

The issue pertaining to reclamation law preferences arose from the assumption that preference customers would be able to purchase only a small percentage of CRSP power. CRSP was thus attacked as a federal subsidy for the private utilities which would purchase the bulk of the power. This fear of a private windfall was exacerbated by language in the early CRSP bills

that appeared to give nonpreference private customers in the upper basin priority over preference customers outside the upper basin. The result of this controversy was a strong declaration of support for the public utility preference under the reclamation laws.

We find nothing in the legislative history—when viewed in the context of the two major issues or policies of maximization of power revenues and adherence to reclamation law preferences —indicating that Congress intended to prohibit a geographic preference in the marketing of CRSP hydroelectric power.

2. *The 83rd Congress*

The legislative history of CRSP encompasses hearings and debates in the 83rd and 84th Congresses. We review the history chronologically.

a. *The House of Representatives*

On April 2, 1953, three bills to authorize storage projects on the Colorado River were introduced in the House by representatives from the upper basin states of Utah and Colorado.[36] These bills each provided a type of geographic preference for marketing power. Arizona Power places great emphasis on the fact that these mandatory geographic preferences were deleted by the House Committee on Interior and Insular Affairs. Because this is the most crucial aspect of Arizona Power's argument, we examine this episode in detail.

The bills were similarly worded in their directions for marketing hydroelectric power. Each *required* the Secretary to include in contracts with customers outside the upper basin states a provision for termination or modification to the extent "deemed necessary by the Secretary" to meet power demands in the upper basin states.[37] The implication of these provisions for the financial success of the projects were hotly debated. Bureau of Reclamation Regional Director Larson testified that preference customers in the upper basin states would initially ues only ten per cent of the electric power. He estimated that it would take 20 years after the construction of the two largest proposed dams before the upper basin would develop a demand for all CRSP power. Representative Hosmer of southern California feared that the difficulty in finding purchasers willing to invest in expensive transmission lines for withdrawable power threatened the economic feasibility of the project. *Hearings on H.R. 4449 et al. Before the Subcom. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. 167-70 (1954).[38]

Moffat, a representative of ten upper basin private utilities, proposed one solution. He expressed a desire that CRSP power

[36]H.R. 4443, 83d Cong., 1st Sess. (1953) (Rep. Aspinall of Colorado); H.R. 4449 (Rep. Dawson of Utah); H.R. 4463 (Rep. Stringfellow of Utah).

[37]For example, § 4 of H.R. 4463 stated in part:

> The Secretary is hereby authorized to enter into such contracts or agreements as, in his opinion, are feasible based upon a recognition and evaluation of the benefits arising from integrated operation of other hydroelectric power plants and of the works herein authorized. Electric power generated at plants authorized by this Act and disposed of for use outside the States of the Upper Colorado River Basin shall be replaced from other sources, as determined by the Secretary, when required to satisfy needs in the States of the Upper Colorado River Basin, at rates not to exceed those in effect for power generated at plants authorized by this Act. Contracts for the sale of power for use outside the States of the Upper Colorado River Basin shall contain such provisions as the Secretary shall determine to be necessary to effectuate the purposes of this Act, including the provision that if and when the Secretary finds (a) that such power cannot practicably be replaced from other sources at rates not exceeding those in effect for power generated by plants authorized by this Act, and (b) that such power is required to satisfy needs in the States of the Upper Colorado River Basin, then such contracts shall be subject to termination or to modification to the extent deemed necessary by the Secretary to meet power requirements in the States of the Upper Colorado River Basin.

[38]Part of the Larson-Hosmer dialogue reads:

> Mr. Larson. . . . If we should build all 9 dams now, there is not sufficient present market for the output of all 9 dams in the upper basin. But there is sufficient market for the Glen Canyon and Echo Park. That does not mean that some will not go downstream.
>
> Mr. Hosmer. That brings up a point here in this specific piece of legislation that is before the House that requires the Secretary of the Interior to insert a termination clause in any contract for power going outside of the Upper Colorado Basin. It can be terminated when and if the power is needed up there. With that in

be marketed to private utilities in the upper basin states rather than preference customers outside of the area. He also proposed that long-term contracts be entered into so that the private utilities could afford to invest in transmission facilities. *Id.* at 570-71.

Preference customers vigorously attacked these proposals. The National Rural Electric Cooperative Association prepared a statement charging that the mandatory geographic preference might lead

> to modification and perhaps abrogation of the preference provision of the reclamation laws . . . . In other words, were the rural electic [sic] systems and other preference agencies in the *upper* Colorado River Basin States unable to *initially or ultimately utilize all of the firm energy* available from the projects, the remaining portion of the energy would be sold to nonpreference customers within these States, if they desired it, rather than to preference customers lying [even slightly] outside of the upper Colorado River Basin area, even though the power could be made available to the preference customers over the existing or proposed facilities of the Federal Government that were electrically integrated with the upper Colorado River Basin project. In general, neither State lines nor the peripheries of river basins bear any relation in distance from a project to economical transmission distances from a project.

Id. at 897 (emphasis added). The rural electric cooperatives also criticized the private utilities for advocating that any marketing

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> mind, do you think that anybody outside of the upper basin would buy the power subject to having it cut off?
> Mr. Larson. I could not speak for those power purchasers.
> Mr. Hosmer. Is it not a fact that the purchasers of power consider the continuation of the supply over a definite period of time an essential?
> . . . .
> . . . .
> Mr. Hosmer. Is it not a fact that it would be risky for any power consumer to attempt to rely upon such a source of power under those conditions?
> Mr. Larson. They could not build expensive transmission lines for them.
> Mr. Hosmer. You have to have transmission lines to move it.

Hearings on H.R. 4449, supra, at 169-70.

plan be incorporated in the text of legislation. They argued that the Secretary's broad discretion in contracting with power customers should be bounded only by the traditional limitations imposed by the reclamation law preferences of Section 485h(c) and the requirement of economic stability. The ecoperatives feared that participation by private utilties might deprive them of the full benefits of the project. *Id.* at 898.[39]

In light of these points of contention the House Committee on Interior and Insular Affairs made two successive amendments. The Committee first substituted for the three proposed bills the language of a draft bill from the Interior Department. H.R. Rep. No. 1774, *supra,* at 19. In place of the mandatory withdrawal clauses of the original bills, Section 6 of the new version placed a ten-year limit on contracts to customers outside of the upper basin states unless the Secretary determined that the power sold was in excess of the probable needs in the upper basin states.[40] The Committee then amended Section 6 by deleting the time limitation on contracts with lower basin customers. It explained the purpose of its amendment as follows:

> By this amendment *all States* of the Colorado River Basin *would be placed on the same basis with respect to acquiring electric power from the project.* In discussing section 6, the committee considered writing into this legislation a power preference provision similar to those in existing reclamation law. Such a provision was not specifically written in because the provisions in general reclamation law, including the

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[39]The Attorney General subsequently construed the preference provision in § 5 of the Flood Control Act of 1944, ch. 665, 58 Stat. 890, 16 U.S.C. § 825s, as not contemplating the "disposition [of power] to a private company under an arrangement whereby the latter obligates itself to sell an equivalent amount of power to preference customers to be designated by the Secretary." 41 Op. Atty. Gen. 236, 244 (1955).

[40]Section 6 of the Interior Department's bill stated in part:

> No contract or agreement for the sale of electric power generated at plants authorized by this Act shall be made for a period of more than 10 years when such power is disposed of for use outside the States of the Upper Colorado River Basin, unless the Secretary of the Interior shall have determined that such power is surplus to the probable needs in such States. All other contracts for the sale of electric power pursuant to this Act shall be for periods not to exceed forty years.

H.R. Rep. No. 1774, *supra,* at 29.

> Reclamation Project Act of 1939 [Section 485h(c)] and the Flood Control Act of 1944, would be applicable to this project under section 3. The committee wishes to make it clearly understood that, although a power preference provision is not specifically written into this legislation, the committee fully supports the application of existing power preference provisions to this project.

Id. at 22 (emphasis added).

This is the first point in the legislative history where the phrase "same basis" is used by a committee. Arizona Power interprets this statement as prohibiting geographic preferences. But reading the statement in the context of the hearings on the mandatory geographic preferences in the original bills, we cannot agree. No one at the hearings objected to the original preferences on the ground that the lower division states would be deprived of their fair share of CRSP power.[41] Instead the critics of the provisions were concerned solely with generating maximum power revenues while adhering to the reclamation law preference for public utilities. The Committee report expressed similar concerns.[42] We believe that when the committee stated that all states would be "on the same basis," it meant that the Secretary should have discretion to market CRSP power wherever he thinks best to maximize revenues consistent with reclamation law preferences. The Committee deleted mandatory preferences because it feared that they might unduly fetter the Secretary's discretion and hamper his efforts to achieve CRSP's underlying objectives. But the Committee did not prohibit the Secretary from adopting a geographic preference if at some time in the future he determined that such a preference was consistent with the policies of maximizing revenue and adhering to reclamation law preferences.

[41] Arizona Power can point to only one instance where any argument has ever been made specifically on behalf of Arizona's interest in CRSP power. A 1950 Bureau of Reclamation report on CRSP analyzed the marketing area solely in terms of the states of Colorado, Utah, Wyoming and New Mexico. *See* H.R. Doc. No. 364, 83d Cong., 2d Sess. 156 *et seq.* (1954). Governor Pyle of Arizona objected to the exclusion of his state from the proposed marketing area, particularly since Glen Canyon was within Arizona territory. The Governor gave no indication, however, of what percentage of CRSP power he thought Arizona should have. Thus, his statement provides no help in establishing a standard to review for reasonableness the 20 percent allocated to the southern division in the Marketing Criteria. *See also* H.R. Doc. No. 364, *supra*, at 8-9 (letter from Governor Pyle).

[42] *See* H.R. Rep. No. 1774, *supra*, at 23-24 (emphasis added):

> [T]he committee expects the proposal by the private power companies for cooperation in the development to be carefully considered by the Department of the Interior and the electric power and energy of the project to be marketed, so far as possible, through the facilities of the electric utilities operating in the area, *provided, of course, that the power preference laws are complied with and project repayment and consumer power rates are not adversely affected.*

Significantly, Arizona Power does not argue that the Marketing Criteria will lead to a loss of potentially recognizable power revenues or a decrease in the firm power rates. Nor does it argue that the Marketing Criteria are inconsistent with reclamation law preferences. Arizona Power argues only that it was "the congressional understanding" that maximum revenues could be achieved under the reclamation law preferences only if CRSP power were sold to Arizona preference customers on a *permanent* basis.

This argument would have some substance if Arizona Power could point to clear evidence that the Committee desired a certain portion of CRSP power allocated to the lower division states and to Arizona in particular. It does not, nor could it. The Committee states that a major purpose of the bill was to provide hydroelectric power for the expanding economy "of the area," referring to the upper basin. H.R. Rep. No. 1774, *supra*, at 11.[43] The Committee did note that there was an increasing need for electric energy "[w]ithin and adjacent to the Upper Basin." *Id.* at 13. But it does not appear that any significant

The Secretary argues that the insertion of Section 6 was designed merely to remedy the previous inapplicability of Section 485h(c) preferences. This is erroneous. Section 2 of each of the three bills submitted provided that all of the statutory law of reclamation was applicable to CRSP, except as otherwise provided. The bills did not, therefore, except application of Section 485h(c) from CRSP. The Committee explanation of Section 6 should be viewed as a statement of clarification only.

[43] The President's statement of approval of the legislation transmitted to the Committee also referred to the upper basin's "much-needed electric power." H.R. Rep. No. 1774, *supra*, at 25.

portion of Arizona was encompassed under this latter description.[44]

We therefore conclude that it was not the House Committee's understanding that CRSP success depended on any given geographic allocation of power. The understanding was that success required only that the Secretary have discretion to market CRSP power in the best interests of the government.

b. The Senate

Proceedings in the Senate closely paralleled those in the House. A bill was introduced there similar to those introduced in the House, S. 1555, 83d Cong., 1st Sess. (1953), and hearings were held on the measure. *Hearings on S. 1555 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. (1954). Many of the same witnesses presented similar testimony. *See, e.g., id.* at 575 (statement of private utilities), 687 (National Rural Electric Cooperative Association). Southern California interests again opposed the proposed legislation. *See* S. Rep. No. 1983, 83d Cong., 2d Sess. 25-30 (1954) (minority views of Sen. Kuchel). The House Committee's amended bill and report were before the full Senate Committee. *See id.* at 20-24.

Section 4 of the Senate bill contained a mandatory geographic preference in favor of the upper basin states identical to that

[44]The National Rural Electric Cooperative Association referred to a group of 18 member systems that were "within or directly adjacent" to the primary marketing area described by Bureau officials before the Subcommittee. The systems were located in Idaho and in the northern division states of Colorado, Utah, Wyoming and New Mexico. *Hearings on H.R. 4449, et al., supra*, at 895. The Association was informed by Bureau Regional Director Larson that some power would be marketed in northeastern Arizona. *See id.*

We note that the large power load centers of Denver, Salt Lake City and Albuquerque are within upper basin states, but are outside the upper basin proper. They would therefore be "adjacent" to the upper basin.

The group of ten private utilities which was represented before the Subcommittee included Arizona Public Service Company. *Id.* at 556. We cannot tell from the record, however, whether Arizona Public Service Company was primarily interested in marketing power to central and southern Arizona.

contained in the House bills. There was little discussion of the marketing problem. The Committee deleted the mandatory preference but did not detail its reasons in its report. Arizona Power points to broad language in the report that "there is a ready market [for hydroelectric power] throughout all the Colorado River Basin States." S. Rep. No. 1983, at 2-3. This statement, however, is ambiguous at best. The preceding paragraph specifically noted that the upper basin states anticipated rapid growth with a resulting "urgent need for water and power," particularly in the Albuquerque, Denver and Salt Lake City metropolitan areas. *Id.* at 2.[45] The legislative history, therefore, presents no clear evidence that the Senate Committee in the 83rd Congress intended to prohibit all types of geographic preferences.

3. The 84th Congress

The House and Senate bills did not reach a vote in their respective chambers during the 83rd Congress and were left as unfinished business with the adjournment of Congress. Successor bills were introduced in the 84th Congress and one, S. 500, was eventually enacted as CRSP.

a. The Senate

Senator Anderson of New Mexico, chairman of the Senate Subcommittee on Irrigation and Reclamation, introduced S. 500 and presided over the hearings on the bill. He described S. 500 as identical to S. 1555 reported out of the Committee to the last Congress. *Hearings on S. 500 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 1 (1955). Therefore he requested the witnesses to view the hearings as supplemental to the previous hearings and to emphasize new material only. *Id.*

Testimony presented at these hearings further supports our view that not all geographic preferences are contrary to the legislative intent. Several witnesses emphasize the benefits of the

[45]Testimony of Senators presenting statements on the bill also reflected an intent to market power in the four upper division states of the upper basin. *See, e.g., Hearings on S. 1555, supra*, at 20 (statement of Sen. Barrett, member of the Committee); *id.* at 178 (statement of Sen. Chavez).

project to the upper basin states.[46] Senator Hayden of Arizona denied that Arizona had any special claim to CRSP power from the Glen Canyon Dam to be built in Arizona.[47]

Arizona Power contends that the Senate Committee's report on the hearings on S. 500 reemphasized its prior position opposing preferential treatment of the upper basin. S. Rep. No. 128, 84th Cong., 1st Sess. (1955). It quotes the following paragraph from the report.

> The committee's position on power marketing of the project is that the area to be served shall be governed only by economical transmission distance direct or through interconnections with other plants either in the Upper or Lower Basin. This policy is necessary to the economic and financial health of the project. This policy in the committee's opinion accords with established practice and policies of reclamation power operations. The committee intends that full equality of treatment be accorded to both Upper and Lower Basin power customers. Established preferences and sound business principles in accordance with existing reclamation law are intended to be applied in the marketing of power from the project, and it is not intended that Lower Basin customers should be discriminated against in any respect.

Id. at 14. We believe that Arizona Power's argument misses the mark.

We note first that the Committee described the power marketing area in much the same terms as it had in the 83rd Congress. *See* Section II, *D, 2, b supra.* It stated generally and by way of summation that "there is a ready market throughout all the Colorado River Basin States." S. Rep. No. 128, *supra,* at 3. But it also described S. 500 as designed to provide hydroelectric power to meet the projected rapidly increasing demand for power in

[46] *Hearings on S. 500, supra,* at 18-19 (testimony of Bureau of Reclamation Commissioner Dexheimer); *id.* at 47 (testimony of Regional Director Larson); *id.* at 524-25 (statement of Sen. Watkins); *id.* at 330 (testimony of National Rural Electric Cooperative Association representative).

[47] *Id.* at 719-20. Senator Goldwater of Arizona also made a statement on the project, but did not refer to power marketing problems of CRSP. *Id.* at 565-70.

the upper basin.[48] Second, we note that the hearings on S. 500 shed no additional light on the power marketing problem.

We therefore conclude that the anti-discriminatory language in the Senate Committee's report merely reflects two policy decisions: first, that the reclamation law preferences be adhered to and second, that power not be marketed in favor of upper basin customers in such a way as to return less than the maximum recognizable power revenues. Arizona Power candidly admits that these two policies are articulated. When the anti-discrimination language of the last clause is construed in light of all that preceded it in the paragraph, it conforms precisely to our view.

Arizona Power does not argue that northern division customers served pursuant to the Marketing Criteria are outside economical transmission distances. Nor does it contend that implementation of the Marketing Criteria will impair the financial health of CRSP. Furthermore, Arizona Power fails to convince us that the "established practice and policy" of federal power marketing forbids all types of geographic preferences. We reject Arizona Power's theory that the Marketing Criteria clearly violate the legislative intent of the Senate Committee in the 84th Congress.

b. The House of Representatives

After the Senate Committee on Interior and Insular Affairs had issued its report and during the time that S. 500 was debated on the floor of the Senate, the House Subcommittee on Irrigation and Reclamation held hearings on five CRSP bills introduced by upper division congressmen.[49] *Hearings on H.R. 270 et al Before the Subcomm. on Irrigation and Reclamation*

[48] The report stated:

> On its [Upper Basin] fringes lie such large centers of population as Albuquerque, Denver, and Salt Lake City and their environs, each of which has experienced rapid growth in recent years; each of which anticipates additional significant growth with ever more urgent need for water and power . . . . The Upper Basin proper . . . stands . . . on the verge of great industrial growth, with consequent increase in need for water for . . . power.

Id. at 2-3.

[49] H.R. 270, 84th Cong., 1st Sess. (1955) (Rep. Dawson of Utah); H.R. 2836 (Rep. Fernandez of New Mexico); H.R. 3383 & 3384 (Rep. Aspinall of Colorado); H.R. 4488 (Rep. Rogers of Colorado)

of the House Comm. on Interior and Insular Affairs, 84th Cong., 1st Sess., pts. 1 & 2 (1955). Subcommittee Chairman Aspinall of Colorado indicated, as Senate Subcommittee Chairman Anderson had done earlier, that the hearings on the 84th Congress were to be a continuation of the hearings on CRSP bills in the 83rd Congress. *Id.*, pt. 1, at 1.

Despite Arizona Power's argument that the House Committee in the 83rd Congress had rejected all geographic preferences, witnesses before the Subcommittee repeatedly assumed that the upper basin (upper division) states would be the principal beneficiaries of CRSP power.[50] Arizona Power concedes as much. Yet the report of the House Committee omitted any clarification of what Arizona Power would consider an erroneous assumption. H.R. Rep. No. 1087, *supra*, at 1, *reprinted in* 1956 U.S.C. Cong. & Admin. News 2346. Indeed, the Committee recognized the merit of the testimony submitted by representatives of the upper basin states advocating the enactment of CRSP to meet growing energy demands in their region. H.R. Rep. No. 1087, *supra*, at 4-5, *reprinted in* 1956 U.S.C. Code Cong. & Admin. News 2350-51. This serves as persuasive evidence that the Committee intended that the upper basin states be the primary beneficiaries of the legislation.[51] Therefore, the "same basis" standard of treatment for Colorado River Basin states advocated by the Committee cannot reasonably be interpreted to prohibit all types of geographic preferences.

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[50]*Hearings on H.R. 270 et al., supra,* pt. 1, at 48, 52 (testimony of Bureau of Reclamation Commissioner Dexheimer); *id.* at 54 (testimony of Regional Director Larson); *id.* at 720-21 (statement of Senator Watkins); *see id.* at 482-83 (statement of Senator Bennett).

[51]Minority reports filed by members of the Committee from southern California and Eastern states provide further evidence. A leading argument against CRSP was that it would burden the states of Wyoming, Colorado, Utah and New Mexico with high-cost hydroelectric power. It was urged by the dissenters that the coal, oil shale and uranium deposits in the four-state region be exploited instead as more economical in the long run. H.R. Rep. No. 1087, *supra*, at 38-39, *reprinted in* 1956 U.S.C. Cong. & Admin. News 2384-85 (minority views of Reps. Saylor, Pillion, Hosmer, Utt, Haley & Shuford); *id.* at 2399 (minority report of Reps. Haley & Shuford); *id.* at 2405 (adverse report of Rep. Pillion); *id.* at 2414 (supplemental minority views). See *Hearings on H.R. 270 et al., supra,* pt. 2, at 486 (statement of Rep. Hosmer advocating atomic energy plants in upper basin).

Arizona Power's response to this evidence is to quote a discussion between Representative Rhodes of Arizona and Commissioner Dexheimer.[52] Arizona Power argues that the conversation reflects an understanding that the deletion of the mandatory preferences from the bills in the 83rd Congress was intended to bar all geographic preferences. This argument is not persuasive. The discussion in fact can more easily be interpreted as granting the Secretary broad discretion in marketing power as long as he complies with the reclamation law preferences and obtains optimum power revenues.

We therefore conclude that the House Committee's requirement that all basin states be "on the same basis with respect to acquiring electric power," when viewed in light of the preceding

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[52]The discussion was as follows:

> Mr. Rhodes. . . . You will recall in the hearings in the 83rd Congress there were provisions for power preference to the States of the upper basin.
>
> I note in the report from the Department and in the bills now, there is no such power preference for any State.
>
> Is it the thought of the Department that the power from Glen Canyon would be marketed on a free and open market, or is there some other thought behind the Department's plans?
>
> Mr. Dexheimer. Of course, we are bound to the present preference laws and the 1937 act. But at the present time we do not know, and we probably won't until we are ready to enter into negotiations for those contracts, who the customers will be nor how much power they will take nor how long a period of time the contract should be made for.
>
> Mr. Rhodes. Is it the thought of the Department, then, that the marketing of power from Glen Canyon will be to those customers, first, which have a preference under the reclamation law, and, second, to those customers to whom sales can be made that are determined to be most advantageous to the Federal Government and the economy of the West?
>
> Mr. Dexheimer. Normally that would be the case unless there should be some provision in the authorization that would be controlling.
>
> Mr. Rhodes. But for the present time there is no such provision, as I read it.
>
> Mr. Dexheimer. Nothing in these bills that I know of.
>
> Mr. Dawson [of Utah]. If I recall in the bills that were introduced last year, there were provisions written into the bills themselves which would limit the marketing of power to the upper basin. And those restrictions are not in the bill this year.
>
> Mr. Rhodes. That is correct.

Hearings on H.R. 270, et al., supra, pt. 1, at 298.

legislative history, does not prohibit all geographic preferences in power marketing.

4. Floor Debates

The floor debates in both legislative bodies support this conclusion. It was unquestionably the understanding in both chambers that the upper basin was eventually to receive the lion's share of CRSP power. While CRSP § 16, 43 U.S.C. § 620o defines the term "States of the Upper Basin" as including Arizona, it is quite clear that Congress, like the committees, did not have Arizona in mind when it referred to the upper basin in the context of power marketing.[53]

a. The Senate

Several groups opposed CRSP in lengthy debates on the Senate floor in 1955. Senator Douglas led the eastern interests opposed to appropriating money for projects of no direct benefit to them. Senator Kuchel represented the California interests who did not want their cheap source of secondary power diminished. Both groups phrased their arguments in terms of the adequacy of power revenues to reimburse most of the CRSP outlay. They also took advantage of the successful nationwide opposition to the large Echo Park project based on scenic and conservationist grounds.

One of Senator Douglas' arguments was that the CRSP irrigation benefits in the upper basin were high-cost and would be reimbursed only to a limited extent. 101 Cong. Rec. 4576 (1955). Subcommittee member Senator Watkins of Utah, floor manager and cosponsor of S. 500, pointed out that the landowners of the upper basin would also be in the same community as the power users. The power users would reimburse a large portion of the project through payment for power. Thus members of the same community would cooperate in paying for CRSP. *Id.* Senator Douglas' later comments indicated that both he and Senator Watkins were referring to power users in the four upper divi-

[53] *See* note 7 *supra*. Arizona Power does not dispute this. Nor would it help Arizona Power to argue that Arizona was considered part of the upper basin for power marketing purposes. To do so would mean that Arizona would then lose the broad protections against discriminatory treatment of lower basin customers that Arizona Power claims is in the legislative history.

sion states. *Id.* at 4578. Subsequent exchanges further clarified this understanding.[54]

We recognize that the remarks of opponents of a bill may not always be authoritative. *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). But Senator Douglas' inferences are certainly relevant and helpful, particularly when Senator Watkins made no response to Senator Douglas' description of the states to be benefited by CRSP. *Arizona v. California, supra*, 373 U.S. at 583 n.85. More importantly, the statements of Senator Watkins, as cosponsor and floor manager, are entitled to substantial weight in construing the power marketing provisions of CRSP. *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967). Senator Watkin's representation of Utah, which stood to benefit from his interpretation of the primary power marketing area, does not diminish the probative value of that interpretation. *Federal Energy Administration v. Algonquin SNG, Inc.*, ... U.S. ..... (June 17, 1976) (slip op. at 16 n.17).[55]

b. The House of Representatives

Arizona Power's position does not fare any better when measured against the House debates of 1956. They demonstrate without question that the intent of the House in passing H.R. 3383 was to favor the upper basin states.

Representative Miller, a member of the Subcommittee, gave an introductory speech on the need for water and power in the growing upper basin. 102 Cong. Rec. 3471 (1956). He referred to the Colorado River Compact which allocated 7,500,000 acre-feet of water a year to both lower and upper basins and stated that CRSP would enable the upper basin to utilize effectively

[54] 101 Cong. Rec. 4578-79, 4635; *see* note 55 *infra*.

[55] Senator Watkins repeatedly assumed that CRSP power would be marketed in the upper division states. 101 Cong. Rec. 4666-68, 4800-01 (1955). More importantly for our purposes, however, he clearly stated that the Bureau of Reclamation would be vested with the discretion to determine where the power would be sold, the duration of the contracts to be negotiated and the rates to be charged. *Id.* at 4666-67. This reference to agency discretion is in harmony with an earlier comment by Representative Rhodes that "the Bureau will have more or less a free hand in marketing power." *Hearings on H.R. 4449, et al., supra*, at 163.

its share of water *and the electric energy* that could be generated from its water.[56] *Id.; see id.* at 3299 (remarks of Committee Chairman Engle). Subcommittee Chairman Aspinall, author of H.R. 3383, specifically stated that the area intended to receive CRSP benefits was composed of Colorado, Utah, Wyoming and New Mexico. *Id.* at 3510; *see id.* at 3610 (remarks of Subcomittee Member Dawson.[57]

Opponents of the bill did not dispute this basic proposition, repeatedly reaffirmed throughout the course of the debates. As in the Senate, they attacked the power aspect of CRSP as not competitive with alternative energy sources in the upper basin area. During the lengthy debates not one member argued in favor of a position similar to that advocated by Arizona Power. We think what Arizona's representatives did advocate is significant. Immediately after ridiculing an argument against the power aspects of CRSP, Representative Stewart Udall remarked:

> I want to tell you why my Republican colleague from Arizona [Mr. Rhodes] and I have supported this bill. We regard the Colorado River Basin as a community. This community sat down many years ago to work out a development plan. Unfortunately, southern California got ahead of us when work began. Why, then, are we here supporting this measure? *Not because our State benefits from it* but because we are keeping the agreement that our State made at that time.

Id. at 3736 (emphasis added).

In some cases a "committee's unambiguous and unaltered treatment" of an issue "is more probative of congressional intent than the casual remark of a single Senator [or Representative] in the floor debate." *Chandler v. Roudebush,* ..... U.S. n.36

[56] *See* Colorado River Compact Art. IV(b), *reprinted in* 70 Cong. Rec. 325 (1928) (". . . water of the Colorado River system may be impounded and used for the generation of electrical power . . . ."). *See also* 102 Cong. Rec. 3478 (1956).

[57] Representative Dawson did refer to Arizona on one occasion. But it is obvious from the context of his remarks that Arizona would be a secondary marketing area. 102 Cong. Rec. 3610 (1956).

See also 102 Cong. Rec. 3713 (remarks of Reps. Dawson and Rogers); *id.* at 3730 (remarks of Rep. Miller); *id.* at 3753 (remarks of Rep. Vanik); *id.* at 3624 (remarks of Rep. Dempsey).

(June 1, 1976) (slip op. at 19 n.36). Our review of the extensive floor debates on CRSP convinces us, however, that in the present case those debates are highly probative of congressional intent.[58] Further, the message of those debates is clear: both legislative bodies intended the upper (northern) division states to be eventually the primary beneficiaries of the legislation. Our review of the floor debates leads us to believe that Congress intended some type of geographic preferences in favor of the states of the upper division.

5. *Summary of Legislative History*

Arizona Power has failed to carry its burden of demonstrating that the Marketing Criteria clearly violate the legislative intent behind CRSP. The deletion of the mandatory geographic preferences in the bills introduced in the 83rd Congress does not indicate an intent to invalidate all geographic preferences. In our view, that deletion had two purposes: (1) to ensure compliance with the Section 485h(c) reclamation law preferences by not permitting nonpreference customers in the upper division states a priority over preference customers outside that area; and (2) to ensure that power be marketed at firm power rates that would maximize power revenues needed to reimburse the government.

The geographic preference of the Marketing Criteria does not contravene these policies. First, the existence of some sort of wtihdrawal program was certainly contemplated by Congress. The history consistently evidenced an intent to promote primarily the development of the upper division states. This intent is effectively accomplished by a scheme to market eventually the bulk of CRSP power to the upper division states while generating power revenues in the interim by selling significant blocks of power to lower division customers. Withdrawal is the only means

[58] The conference committee adopted the language of the House-approved bill (H.R. 3383) where it differed from the Senate version of S. 500. Conf. Rep. No. 1950, *supra,* at 3, *reprinted in* 1956 U.S.C. Cong. & Admin. News 2422, 2425. In amending Section 7 of H.R. 3383 on power marketing no pertinent changes were made in response to the floor debates on a preference for the upper division states. *Id.* at 2-3, *reprinted in* 1956 U.S.C. Cong. & Admin. News 2423-24.

of reconciling these two goals.[59] Second, the Marketing Criteria do not permit nonpreference customers to have a priority over preference customers.

We conclude, therefore, that Arizona Power has failed to establish from the legislative history that the Secretary's action falls outside the realm of his discretion and conflicts with congressional purposes. Equally significant, in our view, is Arizona Power's failure to identify in the legislative history a standard for administrative conduct against which we can measure the Secretary's action. It must be remembered that our task, or at least a part of our task, in this review is to determine whether "there is [a] law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe, supra*, 401 U.S. at 410. Arizona Power has alleged, unsuccessfully, that the geographic preferences violate congressional intent, but it has failed to articulate what law we should apply; *i.e.*, it did not demonstrate what the congressionally devised standard for power distribution is.

Perhaps Arizona Power is suggesting that the applicable law is a "same basis" standard. But we find this standard so vague as to be meaningless and hence no genuine limitation on the Secretary's discretion. For example, a "same basis" standard could be construed as requiring each of the seven basin states to receive one-seventh of the power. It should be noted that Arizona now receives more than a one-seventh share. Alternatively, the "same basis" standard could require allocation on the basis of each state's population, number of preference customers, past or projected energy needs, or the amount of Colorado River water allocated to each state under the Colorado River or

[59]It cannot be argued persuasively that the CRSP projects were scheduled to be constructed so as to avoid withdrawal. The Glen Canyon power plant, the project closest to the lower basin customers, was scheduled to be the first in operation in 1963. Because the Glen Canyon project is to contribute 900,000 kilowatts of the approximately 1,260,000 kilowatts projected by CRSP, the bulk of the CRSP power to be marketed eventually to the upper basin must come from Glen Canyon. This necessitates withdrawal of allotments of power from lower basin customers purchasing Glen Canyon power in the early years of the project.

Upper Colorado River Basin Compacts.[60] But the legislative history provides no basis for adopting any of these interpretations as the controlling standard for CRSP power distribution. Rather, that history points to a congressional commitment of the decision—within certain express limitations not applicable here—to the discretion of the Secretary.

E. Administrative Interpretation

The Secretary also counters Arizona Power's argument by alleging a long-standing administrative interpretation of his statutory authority which is contrary to Arizona Power's theory. The Secretary argues that the formulation of the Marketing Criteria in 1960 and their subsequent insertion into contracts for the sale of CRSP power is a long-standing and reasonable construction entitled to deference. *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965). In this context, we note that Secretary Seaton approved and announced the Marketing Criteria in 1960. After the change in administrations, the Marketing Criteria were reissued in similar form with respect to the issue presented here. Secretary Stewart Udall approved and announced the reissued Marketing Critera in 1962. Secretary Udall had been an Arizona representative on the House Subcommittee which held hearings on CRSP, a member of the Committee which issued the majority report and an advocate on the floor of the House for CRSP. We think it would be difficult to conceive of a situation where "the interpretation given the statute by the officers or

[60]Section 5(e) of CRSP, *as amended*, 43 U.S.C. § 620d(e) provides another possible basis for power allocation. CRSP revenues, composed predominantly of power revenues, in excess of certain repayment and operating costs would be paid out of the Upper Colorado River Basin Fund to upper basin states for further development. The apportionment is as follows: Colorado, 46 per cent; Utah, 21.5 per cent; Wyoming, 15.5 per cent; and New Mexico, 17 per cent. Arizona is not mentioned at all. Arizona, on the other hand, does benefit from the Lower Colorado River Basin Development Fund which contains surplus revenues from lower basin projects such as Hoover Dam, the Parker-Davis project and the Central Arizona project. Colorado River Basin Project Act, Pub. L. 90-537, § 403, 82 Stat. 894 (1968), *as amended*, 43 U.S.C. § 1543.

agency charged with its administration" is entitled to more deference. *Udall v. Tallman, supra,* 380 U.S. at 16.[61]

Arizona Power responds to the administrative interpretation argument by describing the Marketing Criteria as unreasonable and directly contrary to the legislative will. We have already rejected its legislative intent argument.

Arizona Power also contends that the asserted administrative interpretation is not long-standing. Its argument is that the Marketing Criteria were not applied until the 1970 notice of withdrawal of power; prior to that time the administrative interpretation had no detrimental impact because CRSP power for southern division customers was ample. Thus, the duration of the interpretation should be measured only from the time it adversely affected lower division utilities.

We disagree with this argument. Severe detrimental impact of an administrative interpretation is only one factor to be considered in applying *Tallman. Udall v. Tallman, supra,* 380 U.S. at 18. Here the Secretary's interpretation was "notorious" and a "matter of public record" since 1960. *Id.* at 16-18. Its notoriety was heightened by insertion of withdrawal provisions into 87 binding contracts with power customers. The interpretation may properly be treated, therefore, as a "long-standing rule" for purposes of *Tallman.*

[61]The Secretary also contends that Congress has ratified the administrative interpretation. He first points to the circulation of the Marketing Criteria to concerned congressmen and then notes that Congress annually approves appropriations to finance the construction, operation and maintenance of CRSP. But he fails to point to sufficient evidence of a congressional intent to ratify by means of appropriating funds. *See* Arizona Power Pooling Association v. Morton, *supra,* 527 F.2d at 725-26.

The Secretary's second argument is that Section 602 of the Colorado River Basin Project, requiring Section 7 of CRSP, 43 U.S.C. § 620f, to be administered in accordance with its criteria, constitutes ratification of the Marketing Criteria. Pub. L. 90-537, 82 Stat. 900 (1968), 43 U.S.C. § 1552(c). Arizona Power contends, however, that Section 602 on its face deals only with criteria for coordination of water releases from reservoirs constructed under the CRSP and Boulder Canyon Project Acts. But the legislative history reveals quite clearly that Section 602 was directed to the coordination of the power operations of all the projects. H.R. Rep. No. 1311, *supra, reprinted in* 1968 U.S.C. Cong. & Admin. News 3729.

We believe that the administrative interpretation of the Secretary's authority is entitled to deference. That interpretation serves as additional evidence that the intent of Congress has not been violated by the Secretary's proposal to withdraw power pursuant to contracts and entered into under the Marketing Criteria.

III. Conclusion

Having decided the jurisdictional issues againt Arizona Power, we do not need to reach the remaining issues argued by the parties.

We are without jurisdiction to review this case. 5 U.S.C. § 701(a) (2). The order staying the Secretary's implementation of his marketing plan is vacated. The judgment of the district court is vacated and the case remanded for consideration of a motion to dismiss the action.

VACATED AND REMANDED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 1-26-77—410

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARIZONA POWER AUTHORITY; et al., Plaintiffs-Appellants,	
ELECTRICAL DISTRICT NO. 2, PINAL COUNTY, ARIZONA, Intervenor-Plaintiff-Appellant,	No. 75-2141
-vs-	
ROGERS C. B. MORTON, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; et al., Defendants-Appellees,	ORDER
NORTHERN DIVISION POWER ASSOCIATION, INC., Intervenor-Defendant-Appellee.	

Before: BROWNING and WALLACE, Circuit Judges, and FERGUSON,* District Judge

The panel as constituted above has voted to deny the petition for rehearing; Judges Browning and Wallace have voted to reject the suggestion for rehearing en banc and Judge Ferguson has recommended rejection of the same.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

FPI—Sandstone
11-20-74—10M—631

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ARIZONA POWER AUTHORITY; ELECTRICAL DISTRICT NO. 3, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT NO. 4, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT NO. 5, PINAL COUNTY, ARIZONA; ELECTRICAL DISTRICT NO. 6, PINAL COUNTY, ARIZONA; WELLTON-MOHAWK IRRIGATION and DRAINAGE DISTRICT; ROOSEVELT IRRIGATION DISTRICT; and CITY OF SAFFORD; Plaintiffs,	No. CIV 71-683 PHX - CAM
ELECTRICAL DIST. NO. TWO, PINAL CO., ARIZ., Intervenor-Plaintiff,	
vs.	
ROGERS C. B. MORTON, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; and ELLIS L. ARMSTRONG, individually and as COMMISSIONER OF THE BUREAU OF RECLAMATION, UNITED STATES DEPARTMENT OF THE INTERIOR; Defendants.	AMENDED OPINION and ORDER
NORTHERN DIVISION POWER ASSOCIATION, INC., Intervenor-Defendant.	

This case concerns a dispute, here sought to be resolved by motions for summary judgment, over the allocation of hydroelectric power by the United States Secretary of the

FPI-Sandstone
6-3-75-75M-6043

Interior from the Colorado River Storage Projects, as between the plaintiffs and the defendants.

Plaintiffs in this case are the Arizona Power Authority, an agency of the State of Arizona, which purchases and supplies power to preference customers (pursuant to 43 U.S.C.A. 485h) such as municipalities, electric cooperatives, electric and irrigation districts (which categories include the other plaintiffs) within the State of Arizona.

Defendants are the Secretary of the Interior, individually and as Secretary, and the Commissioner of the Bureau of Reclamation, United States Department of the Interior, individually and as Commissioner.

The intervenor-defendant is the Northern Division Power Association, Inc., a non-profit corporation of the State of Utah, constituted by over fifty-eight members including rural electric cooperatives, municipalities and public corporations or agencies.

The Bureau of Reclamation of the United States Department of the Interior has the responsibility under the direction of the Secretary of the Interior for the construction, operation, and maintenance of all federal hydroelectric projects on the Colorado River, including the Colorado River Storage Project (Act of April 11, 1956, 43 U.S.C. 620); the Boulder Canyon Project (Act of December 21, 1928, 43 U.S.C. 617); and Boulder Canyon Adjustment (Act of July 19, 1940, 43 U.S.C. 618); and the Parker-Davis Project Act of May 28, 1954, 68 Stat. 143: see note preceding Sub-chapter I of Chapter 12A of 43 U.S.C.).

The power produced by these projects is sold by the Bureau of Reclamation to other entities, who in turn distribute and sell such power to the ultimate consumer. Unless

otherwise expressly provided by statute, power is marketed pursuant to Section 9(c) of the Reclamation Project Act of 1939 [43 U.S.C. 485h(c)] which provides that "preference" agencies ("Municipalities and other public corporations or agencies; . . . corporations and other non-profit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof") shall have first call on the available supply. A similar provision appears in Section 5 of the Act of February 24, 1911 (43 U.S.C. 522). In marketing such power, the Bureau of Reclamation asserts that it assumes no responsibility for supplying any of its customers' needs beyond the power specifically contracted for.

The first electric-power generating unit of the Boulder Canyon Project (Hoover Dam) became operational in October 1936. Installed generation capacity is 1,345 megawatts. All of this power has been allotted to contractors in the Lower Basin States of California, Arizona, and Nevada. Plaintiff Arizona Power Authority (APA) has a permanent allocation of more than 17% of the firm energy at Hoover Dam. This preference for the Lower Basin States is made pursuant to Section 5(c) of the Boulder Canyon Project Act [43 U.S.C. 617d(c)].

The first electric-power generating unit at the Parker-Davis Project became operational in December 1942. Installed generating capacity of the entire project is 345 megawatts. All of the available power has been allotted to contractors in the Lower Basin States of California, Arizona, and Nevada.

Facilities of the Colorado River Storage Project for the generation of electric power have been constructed at Glen Canyon Dam, located on the Colorado River in Arizona

below the Utah-Arizona border; Blue Mesa and Morrow Point Dams on the Gunnison River in Colorado; and Flaming Gorge Dam in Utah on the Green River below the Wyoming-Utah border. Crystal Dam on the Gunnison River in Colorado is presently under construction. The first electric-power generating unit became operational in November 1963. Installed generating capacity of the foregoing projects is 1,266 megawatts. The Bonneville Unit of the Central Utah Project was authorized by the CRSP Act but is yet to be constructed. The CRSP marketing criteria apply to the power generated from these facilities.

Prior to making the allotments of Colorado River Storage Project Power, the Bureau of Reclamation undertook a series of market studies. The Bureau of Reclamation requested the Federal Power Commission to prepare a power market survey for the Project. The survey, which was completed in June 1958, was to aid the Bureau of Reclamation in planning for marketing the power output of the Colorado River Storage Project by identifying potential markets for the power. In addition, studies were made of transmission facilities to move the power to markets. Assistance and cooperation was received from representatives of preference customers in New Mexico, Colorado, Utah, and Wyoming, as well as from Arizona Municipal Power Users Association and the Salt River Project, two Arizona preference customer agencies.

As a result of the studies, the Bureau of Reclamation submitted its recommendations to the Secretary of the Interior in a May 3, 1960 memorandum. The Bureau's recommendations pertaining to the Colorado River Storage Project marketing criteria followed substantially the recommendations of the Colorado River Basin Consumers Power Inc. That organization has as its members preference

customers from the Upper Basin as well as Arizona Municipal Power Users Association[1/] and the Salt River Project, two Arizona preference customer agencies.

On May 17, 1960, the Acting Secretary of the Interior, Elmer Bennett, approved the recommendation contained in the May 3, 1960 memorandum. On May 18, 1960, Secretary of the Interior Seaton announced the approval of the Colorado River Storage Project Power marketing area and criteria.

In 1961, there was a change in administrations and Stewart Udall became Secretary of the Interior. Thereafter, in 1961, APA met with Secretary Udall to present its views in opposition to the marketing criteria announced by Secretary Seaton in 1960. A similar meeting was also held with Commissioner Dominy of the Bureau of Reclamation.

On March 9, 1962, Secretary Udall announced the Colorado River Storage Project General Power Marketing Criteria. The criteria provided for a Northern Division consisting of the Upper Basin States (Wyoming, Colorado, New Mexico and Utah) and a Southern Division consisting of the Lower Basin State of Arizona and parts of the Lower Basin States of California and Nevada. The criteria provided for the permanent allotment of 80% of the Colorado River Storage Project power in the summer service season and 93% in the winter service season to preference customers in the Northern Division. The remaining power, 20% in the summer service season, and 7% in the winter service season, was permanently allocated to preference customers in the Southern Division.

The Upper Basin States were expected to be slower to develop in population and economic growth than the Lower Basin States and were expected to be unable for some years to make use of their permanent allotments. Until such time as the Northern Division customers were in a position to use the power permanently allotted to them, power was marketed in the

Southern Division in excess of the permanent allotment made to Southern Division customers, subject to withdrawal when needed by the Northern Division customers. The criteria provides as follows.

> "(4) Prior to initiation of construction of transmission lines into the Southern Division, or in the alternative, of arrangements for delivery of power to customers in the Southern Division that the principle of withdrawal set out in subsection D(3) of this Section 4 will be applicable to allotments to and contracts for, the sale of power to such customers."

Colorado River power is generated from facilities at Hoover and Parker-Davis in the Lower Colorado River Basin and from facilities constructed pursuant to the Colorado River Storage Project, Colorado-Big Thompson Frying Pan-Arkansas and Colbran Projects in the Upper Colorado River Basin. The distribution of 3,109 megawatts of summer power and the 3,020 megawatts of the winter power from those facilities were made as permanent allotments after the issuance of the CRSP marketing criteria among the states of the Colorado River Basin.[2/]

Even after the allocation of CRSP power as provided in the Marketing Criteria, the Lower Basin States had allotted to them 58.3% of the total power during the summer service season and 52.8% of the power during the winter service season. These allocations do not reflect withdrawable CRSP power now being marketed in the Lower Basin.

Application forms to purchase CRSP power were sent to all prospective preference customers in the Northern and Southern Divisions, including the plaintiff, APA. The application form contained a clause acknowledging the

defendant's right of withdrawal. The application submitted by APA, received by defendants on April 30, 1962, requested an allotment of a substantial amount of power, but APA deleted from the application form prescribed by defendants, the language:

> "I have read the General Power Marketing Criteria attached hereto and agree any contract entered into in connection with this application may include such provisions as are required to fully implement such criteria, specifically Sections 4d(3), 4d(4) and 6."

Because APA struck this reference to the withdrawal provisions of the Marketing Criteria from its application for CRSP power, Regional Director Clinton of the defendants' Salt Lake City Office informed APA by letter dated May 23, 1962:

> "Although we see no basis on which to allocate power under the exceptions you have indicated, we would be happy to discuss this matter with you at your earliest convenience."

Such discussions thereafter took place in Denver, Colorado on June 14, 1962, with various APA representatives participating. However, no allotment of CRSP power was subsequently made to APA.

Twenty-seven Southern Division preference customers and fifty-eight Northern Division preference customers have entered into contracts with the United States, represented by officials of the Bureau of Reclamation for the purchase of CRSP power. Some of the contracting entities are actually associations, each of which represents a number of other preference agencies. The plaintiffs (other than APA) have entered into contracts for CRSP power.[3/] By these contracts

defendants undertook to make permanent allotments of CRSP power to the plaintiffs (other than APA), and also undertook to make such power available, until needed by the Northern Division. However, defendants required as a condition of delivery of any CRSP power to these plaintiffs that they execute contracts agreeing to withdrawal of any power in excess of their permanent allocation when needed by the Northern Division.

From the dates that the customer plaintiffs signed their contracts for CRSP power, defendants had available for sale and offered to sell to plaintiffs on a withdrawable basis, all the power plaintiffs could use (in addition to their "permanent" allotments) to meet the requirements of their customers.

This situation lasted until December 1970 when the Bureau of Reclamation notified Southern Division customers, which included the plaintiffs, that not later than March 31, 1973, the Bureau would give notice that CRSP power would be withdrawn beginning with the 1976 summer season. Following the receipt of this letter, APA announced, at a meeting held on April 2, 1971 (at which representatives of defendants were present), that it had retained attorneys to examine APA's position with respect to the proposed withdrawal. Thereafter, on June 22, 1971, APA held a meeting with the other plaintiffs at which it was decided to submit letters to the defendants protesting the proposed withdrawal as illegal and beyond their authority, and if the protests were denied, to institute litigation to protect the rights of the various entities.

The plaintiffs, other than APA and Electric District No. 5, thereafter sent letters to defendants asserting,

inter alia, that the geographic preference for the Northern Division preference customers and the withdrawal provision implementing that preference as set out in the marketing criteria and the contracts were illegal and beyond defendants' authority to require and hence that such plaintiffs would resist and contest any withdrawal of power. APA, on behalf of the preference customer, plaintiffs, on July 27, 1971 also notified the defendants of the plaintiffs' opposition to the proposed withdrawal on the ground that the preference for the Northern Division preference customers, which the withdrawal was intended to implement, was illegal and beyond the defendants' authority. On August 31, 1971, the Secretary of the Interior, Rogers C. B. Morton, by his Deputy Assistant, advised APA that CRSP power was being marketed pursuant to the provisions of the General Power Marketing Criteria, that APA's customers had accepted the terms of those criteria and that prior contractual commitments with those customers based on the approved and accepted marketing criteria would not be altered.

The instant action was filed in December 1971 seeking an injunction and declaratory judgment against the Secretary of the Interior and the Commissioner of the Bureau of Reclamation, both individually and in their official capacities, concerning marketing of power from the facilities of the Colorado River Storage Project.

Specifically, plaintiffs ask that the criteria and the contracts that have been entered into pursuant thereto be declared invalid, and that the defendants be enjoined from using the criteria and that an order be entered prohibiting the withdrawal of power as provided in the contracts, and finally, that the Court order the defendants to negotiate new contracts for them.

The defendants urge that their motion for summary judgment be granted on the grounds: (1) that the complaint fails to state a claim upon which relief can be granted; (2) that the suit is an unconsented suit against the United States; and (3) that there are no issues of material fact and the defendants are entitled to judgment as a matter of law.

Intervenor-defendant Northern Division Power Association, Inc. joins defendants in moving for summary judgment.

To determine whether either motion for summary judgment can be granted, two issues must be decided. first, whether the United States Secretary of Interior acted within the scope of his authority, and secondly, whether or not the action of the Secretary in issuing the criteria was arbitrary, capricious, or unreasonable as a matter of law.

Both plaintiffs and defendants agree that the first issue is ready for determination by the Court. Plaintiffs, however, argue that there are material issues of fact which prevent a determination by the Court of the second issue. This Court is not convinced that plaintiffs have made a showing that any material issue of fact prevents disposition of this case on both grounds by the granting of the defendants' motion for summary judgment.

Therefore, the Court finds that the defendants' motion, including the intervenor's, should be granted, and it is so ordered.

The action of the United States Secretary of the Interior in promulgating the Colorado River Storage Projects Marketing Criteria for the allocation of power were within his statutory authority. The criteria issued by him are reasonable, and not arbitrary or in abuse of his discretion.

As already noted in the recitation of the factual background of this case, the delegation of power to the Secretary by the Congress is found in the following statutes: 43 U.S.C. 620, 43 U.S.C. 620f, and 43 U.S.C. 485h(c).

Furthermore, Congressional authorization of the Secretary's action is clear. In 43 U.S.C. 1552, Congress requires the Secretary to prepare a long range plan for operation of the reservoirs of the Colorado River Storage Project. Congress in subsection (C) required that section 620(f) of Title 43 would be included in the long range plan.

Congressional intent by reference to legislative history such as committee reports is inconclusive and contradictory and therefore of little value in resolving the issues here involved.

In any case, the clear wording of the applicable statutes rather than inconclusive legislative history controls. Gemsco v. Walling, 324 U.S. 244 (1945).

Not only did the Secretary have the statutory power to establish the criteria, but the criteria was based on extensive studies and reports prepared over a period of several years in the 1950's and 1960's. These studies and reports, initially prepared by the Federal Power Commission at the request of the Bureau of Reclamation, were finally completed by the Bureau and approved by two Secretaries of Interior (with some modifications).

As previously pointed out in ne factual background, most preference customers from the upper and lower basin states participated in the studies. The criteria were given wide publicity, were made available to power users, and were given to Congress and governors and state officials. The criteria and the interpretation of the Secretary's authority

explicit therein have been in effect since March of 1962 and constitute a long-standing administrative interpretation.

Since the criteria, approved by two Secretaries of Interior, were based on careful, prolonged studies by experts in the field pursuant to known and fixed guidelines and in accord with statutory authority, the criteria as decided upon by the Secretary and here under attack cannot be said to be arbitrary, capricious, or unreasonable.

Great deference should be given to the interpretation given to the statute by the officers or agency charged with its administration so long as such interpretation is not unreasonable. Udall v. Tallman, 380 U.S. (1965); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The Court should not in the absence of abuse, substitute its judgment for that of the Administrator, the Secretary of Interior, in this case.

Under reclamation law, and specifically 43 U.S.C. § 485h(c), the Secretary is directed to enter into contracts for the sale of power which shall not exceed forty years. He is directed that the rates must "in his judgment" produce power revenues sufficient to cover an appropriate share of the annual operation and maintenance costs of the project and interest on the share of the construction investment of not less than three percent per annum.

Further the Act provides that in the sale or lease of power, preference shall be given to municipalities and other public corporations or agencies and to cooperatives or other non-profit organizations financed with loans made pursuant to the Rural Electrification Act of 1936. 43 U.S.C. § 485h(c).

No other limitations are imposed upon the

Secretary's authority to dispose of power generated from facilities constructed under the Colorado River Storage Project.

In addition to the specific authority set forth in 43 U.S.C. § 485h(c), the Secretary under reclamation law is also given broad general authority "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of sections . . . 485(d) to 485(h)" [43 U.S.C. § 485(i)].

As the Supreme Court stated in Arizona v. California, 373 U.S. 546, 580, 590 (1963), when Congress in an Act grants authority to the Secretary to contract, that authority includes the power to choose with whom and upon what terms contracts will be made, unless Congress has placed some limit on that authority. Therefore, within the limitations noted above, those dealing with preference customers, the Secretary was authorized to allocate and distribute the available CRSP power in the same way the Supreme Court found him authorized with respect to the allocation of Colorado River water, and judgment is entered herewith in accordance with this order and opinion.

DATED; May_____,1975.

C. A. MUECKE
United States District Judge

FOOTNOTES

1/ [Reference on page 5]

Arizona Municipal Power Users Association had as members at this time, the following plaintiffs: The City of Safford and Electrical Districts Nos. 2, 3, 4, 5, and 6.

2/ [Reference on page 6]

	Basin	MW Summer	% of Total	MW Winter	% of Total
California	lower	1019	32.8	1006	33.3
Arizona	lower	496	15.9	319	10.6
Nevada	lower	272	8.8	244	8.1
U.S.	lower	25	.8	25	.8
LOWER BASIN		1812	58.3	1594	52.8
Utah	upper	347	11.1	405	13.4
Wyoming	upper	153	4.9	129	4.3
Colorado	upper	645	20.8	598	23.1
New Mexico	upper	152	4.9	194	6.4
UPPER BASIN		1297	41.7	1426	47.2
TOTALS		3109	100.0	3020	100.0

3/ [Reference on page 7]

Electrical District Number Six-Pinal County	3-12-65
Electrical District Number Three-Pinal County	5-17-65
Wellton-Mohawk Irrigation and Drainage District	4-4-66
Electrical District Number Five-Pinal County	5-1-57
Electrical District Number Four-Pinal County	5-1-67
Roosevelt Irrigation District	6-1-68
City of Safford	6-30-70

APPENDIX D

Income from the sale of storage project power in fiscal year 1976 amounted to almost $58.0 million, an increase of more than $11 million over fiscal year 1975. The highest monthly revenue during the year was $7.2 million in May 1976. In addition to normal generation and sales, the project purchased and resold 2,259,969,837 kilowatt-hours (kWh). Energy sales in fiscal year 1976 were in excess of 7.3 billion kWh.

Fiscal Year 1976 Sales and Revenue by States

	kWh	Dollars
Arizona	1,891,235,531	17,758,668
California	529,935,707	5,811,432
Colorado	2,298,855,029	15,374,866
Nevada	235,780,295	3,112,536
New Mexico	1,024,415,457	7,343,224
Utah	1,345,858,858	8,238,801
Wyoming	32,785,215	217,217
Total	7,358,866,092	57,856,544